TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 143

VERNA LEIB SUTTON, PETITIONER,

vs.

R. WELLS LEIB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 23, 1951.

CERTIORARI GRANTED OCTOBER 15, 1951.

In the

United States Court of Appeals

For the Seventh Circuit

No. 10294

VERNA LEIB SUTTON,

Plaintiff-Appellant,

vs.

R. WELLS LEIB,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

INDEX.

1 Pleas in the District Court of the United States of America within and for the Southern Division of the Southern District of Illinois, held in the City of Springfield, in said Division and District, before the Honorable Charles G. Briggle, Judge of said Court, on Monday the second day of January, in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the United States of America, the one hundred and seventy-fourth.

Present:

Charles G. Briggle, District Judge.
Robert Grant, United States Marshal.
Howard L. Doyle, United States Attorney.
G. W. Schwaner, Clerk.

Attest:

G. W. Schwaner,
Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Southern Division.

Verna Leib Sutton, *Plaintiff-Appellant,* *vs.* R. Wells Leib, *Defendant-Appellee.*	Civil Action No. 1134

STATEMENT IN ACCORDANCE WITH RULE 10(b) OF RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Commencement of Suit—Complaint Filed April 12, 1950.

Names of Parties—Set forth in Title of Case Above.

Motion to Dismiss—Filed May 1, 1950.

Reply to Motion to Dismiss—Filed May 29, 1950.

Amendment of Motion to Dismiss by Addition of Prayer for Summary Judgment—Filed June 5, 1950.

Cause submitted on Defendant's Amended Motion and Taken Under Advisement—June 16, 1950—By Honorable Charles G. Briggle, U. S. District Judge.

Opinion of Honorable Charles G. Briggle—Filed August 21, 1950.

Judgment Order (Judgment against Plaintiff and for Costs)—Filed August 21, 1950.

Motion by Plaintiff for a New Trial—Filed August 22, 1950.

Suggestions in Objection to Motion by Plaintiff for a New Trial—Filed August 28, 1950.

Motion by Plaintiff for a New Trial Denied—Filed September 5, 1950.

Notice of Appeal—Filed October 3, 1950.

3 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1134) * *

Be It Remembered that heretofore to wit: on the 12th day of April, in the year of our Lord one thousand nine hundred and fifty, that being one of the days of the January Term, A. D. 1950 of the District Court of the United States for the Southern Division of the Southern District of Illinois, there was filed in the office of the Clerk of said court, a certain Complaint, which said Complaint was and is in the words and figures, following, to wit:

4 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—1134) * *

Now Comes The Plaintiff, Verna Leib Sutton, by F. T. Carson Law Offices, Joseph R. Carson, of counsel, and states:

1. That the plaintiff is a resident and citizen of the State of New York, and the defendant is a resident and citizen of the State of Illinois, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

2. That the plaintiff and defendant were lawfully united in marriage on the 25th day of June A. D. 1924, in the City of Jacksonville, Illinois.

3. That the plaintiff filed a complaint for divorce against the defendant herein in the Circuit Court of Sangamon County, State of Illinois, in October, A. D. 1939, and that a decree of divorce was granted to the plaintiff herein by said Court on the 11th day of October, A. D. 1939, a copy of which decree is hereto attached and annexed as Exhibit "A".

4. That by the terms of said Decree of Divorce, the defendant, R. Wells Leib, was ordered to pay to the plaintiff the sum of One Hundred Twenty-Five ($125.00) Dollars on or before the first day of each calendar month after the date of the entry of said Decree for so long
5 as the plaintiff remained unmarried, or for so long as said Decree remained in full force and effect, unaltered and unmodified.

5. That said Decree of Divorce has at no time been altered or modified.

6. That the defendant, R. Wells Leib, made said payments to the plaintiff as provided in said decree until to-wit the 1st day of August, A. D. 1944, at which time said defendant ceased to make said payments, and that he has made no payments to the plaintiff since that date.

7. That the plaintiff was lawfully married to one Sherwood Sutton on the 21st day of November, A. D. 1947.

8. That there is due and owing to the plaintiff from the defendant all payments as provided in the said Decree of Divorce from the 1st day of August A. D. 1944 to the 21st day of November, A. D. 1947, which consists of forty (40) monthly payments of $125.00 each, making a total of Five Thousand ($5,000.00) Dollars, plus interest thereon.

Wherefore, the plaintiff, Verna Leib Sutton, prays judgment against the defendant, R. Wells Leib, in the sum of Five Thousand ($5,000.00) Dollars, plus interest thereon and the costs of this proceeding:

Verna Leib Sutton,
Plaintiff,
By Francis T. Carson Law Office,
By Joseph R. Carson,
Of Counsel,
Her Attorney.

F. T. Carson Law Offices,
Joseph R. Carson, *Of Counsel,*
102 E. Main St.,
Urbana, Illinois.

6 **Exhibit "A".**

State of Illinois, } ss.
Sangamon County, }

IN THE CIRCUIT COURT OF SAID COUNTY,

October, 1939.

Verna Lee Leib,
Plaintiff,
vs.
R. W. Leib,
Defendant.
} Complaint for Divorce
No. .....
In Equity.

DECREE.

And now this matter coming on to be heard, and it appearing to the Court that the Defendant, R. W. Leib, has entered his appearance in writing to this cause and has waived service of process upon him, and thereupon, on motion of plaintiff's attorneys, the said defendant was ordered to file his Answer to said Complaint on or before the 11th day of October, A. D. 1939, at nine o'clock A. M., and the defendant having answered said Complaint by Jerome R. Finkle, his attorney; and now this matter again coming on to be heard upon said Complaint and Answer, and the Court having heard the evidence of witnesses produced, sworn and examined in open court, heard the arguments of counsel, and being fully advised in the premises, on consideration thereof, doth find: That this Court has jurisdiction of the parties to and the subject matter of this suit; that the plaintiff is now and was for more than one year immediately prior to filing her Complaint in this cause a resident of the City of Springfield, in the County of Sangamon and State of Illinois; that the plaintiff and defendant were lawfully united in marriage on the 25th day of June, A. D. 1924, in the City of Jacksonville, Illinois; that the defendant is guilty of extreme and repeated cruelty in the manner and form as charged in said Complaint; that the equities of this cause

are with the plaintiff, and that the parties hereto have
7 settled and adjusted the property rights between them.

It is therefore Ordered, Adjudged and Decreed by the Court that the marriage between the plaintiff and the defendant is hereby dissolved, and the parties hereto, and each of them are hereby forever freed from any and all of the obligations thereof; that the property settlement between the parties shall be, and it is hereby approved, and from and after this date neither of the parties hereto shall have any right, title or interest in or claim to the property, real or personal, of the other, whether owned by either of them now or hereafter acquired; that the defendant shall on or before the first day of each calendar month hereafter pay to the plaintiff the sum of One Hundred Twenty-five Dollars ($125.00) for so long as the plaintiff shall remain unmarried, or for so long as this decree remains in full force and effect, unaltered and unmodified.

It is further Ordered that the defendant pay the costs and charges of this proceeding.

Dated at Springfield, Illinois, this 11th day of October, A. D. 1939.

Enter:

Victor Hemphill,
Circuit Judge.

Indorsed: Filed Apr. 12, 1950. G. W. Schwaner, Clerk.

8 And afterwards, to wit: on the 12th day of April, A. D. 1950, there was issued by the Clerk of said court a certain Summons, which said Summons, together with the Marshal's Return thereon, was and is in the words and figures, following, to wit:

9 UNITED STATES DISTRICT COURT.

* * (Caption—1134) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Howard Ralph Blalock, plaintiff's attorney, whose address is 1404 S. 11th St., Springfield, Illinois, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

G. W. Schwaner,
Clerk of Court,
By Clara B. Reisch,
Deputy Clerk.

(Seal)

Date: April 12th, 1950, Springfield, Illinois.

Indorsed, Filed April 17, 1950. G. W. Schwaner, Clerk.

Return On Service Of Writ.

I hereby certify and return, that on the 14th day of April, 1950, I received this summons and served it together with the complaint herein as follows: By delivering a copy of the within summons together with a copy of Complaint thereof to the within-named R. Wells Leib at 908 Ridgely Building, Springfield, Illinois this 14th day of April, 1950.

Robert Grant,
United States Marshal,
By Elmer W. Schultz,
Deputy United States Marshal.

Marshal's Fees.

Travel	$ .12
Service	2.00
	$2.12

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

U. S. Marshal's No. 8389, Vol. 9, Page 341.

10 And afterwards, to wit: on the 1st day of May, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Motion to Dismiss, which said Motion was and is in the words and figures, following, to wit:

11 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—1134) * *

MOTION TO DISMISS.

Now comes the defendant, R. Wells Leib, by A. M. Fitz-Gerald, his solicitor, and enters his appearance specially and solely for the purpose of challenging the jurisdiction of this court, and for want of such jurisdiction respectfully moves the court that the complaint and purported cause of action be dismissed and as grounds for and in support of this Motion, shows as follows:—

(1) That the complaint herein shows upon its face that it is filed for the purpose of obtaining an adjudication of this court concerning the marital status of the plaintiff which such subject matter is beyond the jurisdiction, authority and power of this court to adjudicate.

(2) That the complaint does not involve the amount of Three Thousand Dollars ($3,000.00) and accordingly this court is without jurisdiction of the purported cause of action.

(3) That an adjudication in this cause necessarily involves the construction, meaning and effect of a divorce decree of the Circuit Court of Sangamon County in the State of Illinois, concerning which subject matter this court does not have jurisdiction, power or authority.

(4) That the complaint fails to disclose the admitted fact that the plaintiff, Verna Leib Sutton, was married to one Walter J. Henzel at Reno, Nevada, on July 3, 1944, and that this defendant paid the amounts specified in the Illinois decree for divorce through and including Au-
12 gust 1, 1944, and that by the terms of such Illinois divorce decree this defendant was absolved, relieved and discharged from the burden of further payments to the plaintiff, subsequent to July 3, 1944, the said omitted facts concerning the marriage of the plaintiff to said Walter J. Henzel, and her residence and co-habitation with him as his wife from July 3, 1944, and upon information

and belief alleges, until the month of November 1947, are set forth by the affidavit of the defendant, attached hereto and made a part hereof, pursuant to the provisions of 43(e) and 56 of the rules of Federal Civil Procedure.

(5) That this court has no jurisdiction of the subject matter of the purported cause of action for the reason that the decree of the Circuit Court of Sangamon County, Illinois, requiring the payment of alimony until the remarriage of the plaintiff, has never been modified, set aside or reversed, and that this court does not have jurisdiction of an action for arrearages in alimony unless and until the amount of such arrearage has been determined and entered in the form of a judgment by the court entering said decree, and accordingly the full faith and credit provisions of the United States Constitution does not require this court to give faith or credit to such decree of the Circuit Court of Sangamon County, until that court has entered a final order in the form of a judgment for money.

Wherefore, the defendant moves that the said Complaint and cause of action be dismissed for want of jurisdiction and that summary judgment be entered accordingly.

R. Walls Leib,
Defendant.

A. M. FitzGerald,
Attorney for Defendant,
908 Ridgely Building,
Springfield, Illinois.

13 State of Illinois,
County of Sangamon. } ss.

R. Wells Leib, being first duly sworn according to law upon oath deposes and states that he is the same person named above as the defendant, and whose name is subscribed to the above and foregoing Motion, and that the said Motion and the matters and things therein contained, are true in substance and in fact, except as to the matters alleged to be upon information and belief, and as to these he believes them to be true.

R. Wells Leib.

Subscribed And Sworn to before me this 29th day of April, A. D. 1950.

Wm. F. Fuiten,
Notary Public.

(Seal)

14 State of Illinois, } ss.
County of Sangamon. }

Affidavit.

R. Wells Leib, being first duly sworn according to law, upon oath deposes and states that he was divorced from the said Verna Leib Sutton, by decree of the Circuit Court of Sangamon County in the State of Illinois, on October 11, 1939, and that from the date of said decree until the first week of August, 1944, this affiant paid to the plaintiff all sums required to be paid under said decree in full; that afterwards, this affiant learned that the said Verna L. Sutton (then Verna L. Crawford) was lawfully joined in marriage on July 3, 1944, to Walter J. Henzel, in the City of Reno, County of Washoe and State of Nevada, and that from the date of said marriage to said Henzel, as affiant is informed and believes and so states the fact to be, resided with the said Walter J. Henzel, until the month of November, 1947, the plaintiff and said Walter J. Henzel resided and cohabited together as husband and wife, in the City of New York and State of New York; that a full, true and correct certified copy of the application for marriage license and marriage certificate, and the facts surrounding said marriage to Walter J. Henzel, is attached hereto, made a part hereof, and reference had thereto for more particularity.

Affiant further states that afterwards the said Verna Crawford Henzel, the plaintiff, through her attorneys and solicitors, Baker and Rosen, of 545—5th Avenue, New York City, New York, demanded of this affiant that he pay the amount provided by the decree of the Circuit Court of Sangamon County, to the said Verna Crawford Henzel, now the plaintiff, for the months of June and July, 1944, and informing this affiant that his information concerning the remarriage of his former wife was correct, and that pursuant to said demand made by the plaintiff, through her said solicitors, this affiant sent to and paid to the said Verna Crawford Henzel, the sum of One Hundred Eighty Dollars ($180.00), and received from the solicitors, for the said Verna Crawford Henzel, an acknowledgment of the receipt thereof as being in full of all claims of the said Verna Crawford Henzel under said decree. Affiant states

that true and correct copies of the demand and the receipt mentioned above, made by the solicitors for the plaintiff, are attached hereto and made a part hereof, and reference is made thereto for further particularity.

Affiant further states that the above and foregoing facts are not disclosed by the Complaint of the plaintiff, but that said facts in this affidavit stated are each and all true, are beyond contradiction or dispute, and that this affiant can and will consistently testify under or to said facts and is ready and willing to produce the originals of the documents referred to in this affidavit, upon hearing hereof, and that this affidavit is made pursuant to the provision of the rules of civil practice for the District Courts of the United States, in connection with the Motion of this affiant to dismiss said action, and for final and summary judgment in favor of this affiant, as defendant, and against said Verna Leib Sutton, as plaintiff.

Further affiant saith not.

R. Wells Leib.

Subscribed And Sworn to before me this 29th day of April, 1950.

Wm. F. Fuiten,
Notary Public.

(Seal)

Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455
August 10, 1944.

Jerome Finkle Esq.
c/o Knotts, & Dobbs
Legislative Reference Bureau
Capitol Building
Springfield, Illinois.

Dear Sir:

Please be advised that your understanding of the re-marriage of our client Mrs. Verna Leib is correct and that said remarriage took place on the third day of July, 1944.

However, the alimony payments for the months of June and July, 1944 are still due and payable under the terms of the Divorce Decree which provided for payments of alimony the first of each month until she re-marries.

We shall expect the check in full settlement by return mail otherwise we shall be compelled to enforce the collection of the amount due.

Very truly yours,
Baker and Rosen,
s/ A. David Rosen.

16 Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455
September eighth
1944

Jerome Finkle, Esq.
Legislative Reference Bureau
State Capitol Building
Springfield, Illinois.

Dear Sir:

This is to acknowledge receipt of the check in the sum of $180, made by R. W. Leib, payable to the order of Verna Crawford Henzel.

This remittance satisfies in full the alimony claim of the former Mrs. Leib.

Yours very truly,
Baker & Rosen,
S/ A. David Rosen.

ADR:dj

17 No. 176660.

Affidavit of Application for Marriage License

State of Nevada, } ss.
County of Washoe. }

The undersigned being duly sworn, deposes and says:
My name is Walter J. Henzel.
My age is 40.
I reside in the City of Reno.
County of .....
State of Nevada.
Previously married Yes. Wife Deceased.
Divorced Yes. When July 3, 1944.
Where Reno, Nevada.
On what grounds Cruelty.
I desire a license to authorize my marriage with;
Her name is Verna L. Crawford.
Who resides in the City of New York City.
County of .....
State of New York.
Whose age is 40.
Previously married Yes. Husband deceased.
Divorced Springfield, Ill.
On what grounds Cruelty.
I know of no legal objection to our marriage.

Walter J. Henzel,
Vera Lee Crawford.

Subscribed and sworn to before me this 3 day of July A. D. 1944.

E. H. Beemer,
County Clerk,
By V. A. Given,
Deputy Clerk.

18 IN THE SECOND JUDICIAL DISTRICT COURT
of the State of Nevada,
in and for the County of Washoe.

.....
.....
Plaintiff,
vs.
.....
.....
Defendant.

No. ..... Dept No. .....

I, E. H. Beemer, County Clerk and ex officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy, attached hereto is a full, true and correct copy of the Affidavit of Application for Marriage License No. 176660 issued July 3d 1944.

Walter J. Henzel and Vera L. Crawford

and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside, and is still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 30th day of August, A. D. 1944.

S/ E. H. Beemer,
County Clerk.

(Seal)

I, Wm. McKnight, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 30th day of August, A. D. 1944.

S/ Wm. McKnight,
One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

State of Nevada, } ss.
County of Washoe. }

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable Wm. McKnight, whose name is subscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 30th day of August, A. D. 1944.

S/ E. H. Beemer,
(Seal) *County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.*

20 Marriage Certificate.

State of Nevada, } ss.
County of Washoe. }

176660

This Is To Certify that the undersigned Clergyman Brewster Adams did, on the 3rd day of July, A. D. 1944 join in lawful Wedlock Walter J. Henzel of Reno, State of Nevada and Verna L. Crawford of New York City, State of New York with their mutual consent in the presence of Paula Brueckner and Willi Brueckner who were witnesses

Rev. Brewster Adams,
Pastor Baptist Church.

Recorded at the request of Rev. Brewster Adams, Filed July 5, 1944.

Delle B. Boyd,
County Recorder.

State of Nevada, } ss.
County of Washoe. }

I, Delle B. Boyd, County Recorder in and for Washoe County, do hereby certify that I have compared the foregoing with the original record thereof as the same appears in my office, in vol. "91" of Marriages, page 355 and that the foregoing document is a full, true and correct transcript therefrom, and of the whole of such original record.

Witness my hand and official seal hereunto set this 30th day of August, A. D. 1944.

S/ Delle B. Boyd,
County Recorder,
By S/ Mary Pappas,
Deputy Recorder.

(Seal)

21. I, Wm. McKnight, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that Delle B. Boyd, who has signed the annexed attestation, is the duly elected and qualified County Recorder of the County of Washoe, and was at the time of signing said attestation, Recorder of said Court.

That said signature is her genuine hand writing, and that all of her official acts as such Recorder are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 30th day of August A. D. 1944.

S/ Wm. McKnight,
One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

State of Nevada, } ss.
County of Washoe. }

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable Wm. McKnight, whose name is subscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 30th day of August A. D. 1944.

S/ E. H. Beemer,
(Seal) *County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.*

Indorsed: Filed May 1, 1950. G. W. Schwaner, Clerk.

22 And afterwards, to wit: on the 16th day of May, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Tuesday, May 16, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

Verna Leib Sutton,
vs.
R. Wells Leib. } Civil Action No. 1134.

This cause coming on this day to be heard upon the motion of the defendant to dismiss the complaint, the court hears the arguments of counsel thereon and not being fully advised in the premises, takes the same under advisement. It is ordered by the court that the plaintiff have leave to file a brief herein by May 22, 1950 and that the defendant have leave to file a reply brief herein by May 31, 1950.

23 And afterwards, to wit: on the 29th day of May, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Monday, May 29, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

* * (Caption—1134) * *

Comes now the plaintiff herein by Howard R. Blalock, Esq., her attorney, and moves the court for leave to file reply, with accompanying affidavits attached, to the defendant's motion to dismiss, and the court having duly considered the said motion and being fully advised in the premises, it is ordered by the court that the said motion be and is hereby allowed.

24 And afterwards, to wit: on the 29th day of May, A. D. 1950, there was filed in the office of the Clerk of said court, a certain Reply to Motion to Dismiss, with Accompanying Affidavits, which said Reply was and is in the words and figures following, to wit:

25 IN THE UNITED STATES DISTRICT COURT.

(Caption—1134)

REPLY TO MOTION TO DISMISS, WITH ACCOMPANYING AFFIDAVITS.

Now comes the Plaintiff, Verna Leib Sutton, by F. T. Carson Law Offices, by Joseph R. Carson, of Counsel, Howard R. Blalock and Jean S. Sheppard, her attorneys, and in reply to Defendant's Motion to Dismiss, states as follows:

1. Plaintiff denies the allegations contained in Paragraph One of Defendant's motion to dismiss.

2. Plaintiff denies the allegations contained in Paragraph Two of Defendant's motion to dismiss.

3. Plaintiff denies the allegations contained in Paragraph Three of Defendant's motion to dismiss.

4. Plaintiff denies the affirmative matters contained in Paragraph Four in part and states that while she went through a marriage ceremony with one Walter J. Henzel in Reno, Nevada, on July 3, 1944, that this marriage was subsequently declared null and void and of no legal effect by decree of the Supreme Court of New York on June 6, 1947, at which time the aforesaid Supreme Court of New York, sitting in the County of New York, State of New York, granted the Plaintiff a decree of annulment and an exemplified copy of this decree is herewith attached as Plaintiff's Exhibit "B". Plaintiff further states that
26 the wife of the said Walter J. Henzel secured a decree of separation from said Walter J. Henzel on June 22, 1945, in the Supreme Court of the County of New York, State of New York, in which decree the Court declared a previous Reno, Nevada divorce secured by said Walter J. Henzel to have been void, an exemplified copy of which is herewith attached as Plaintiff's Exhibit "A". Plaintiff further denies that she cohabited with the said Walter

J. Henzel from July 3, 1944 until the month of November, 1947, and states that upon the filing of a complaint for separation by Dorothy Henzel against Walter J. Henzel, on August 3, 1944, the Plaintiff and said Walter J. Henzel ceased cohabiting, all of which matters appear more fully in an affidavit executed by the Plaintiff and herein attached.

5. Plaintiff admits the allegations contained in Paragraph Five which states that the decree in the Circuit Court of Sangamon County, Illinois has never been modified, set aside or reversed but denies that this Court lacks jurisdiction to hear these matters.

Wherefore, the Plaintiff prays that the Motion to Dismiss be overruled.

Verna Leib Sutton,
By Joseph R. Carson,
One of her Attys:

F. T. Carson Law Office,

Joseph R. Carson,
Attorney,
102 East Main Street,
Urbana, Illinois.

Howard R. Blalock,
Attorney,
1404 South 11th Street,
Springfield, Illinois.

Jean S. Sheppard,
Attorney,
303 East Washington Street,
Bloomington, Illinois.

27 • • (Caption) • •

State of New York, }
County of New York. } ss:

Verna Leib Sutton, being duly sworn deposes and says:

I am the plaintiff herein. I was born in Rochester, State of Illinois, and on June 25, 1924, I was married to R. Wells Leib, the defendant herein, in Jacksonville, State of Illinois, and that we lived as husband and wife in Springfield, Illinois until October, 1939. That on or about October 11, 1939, the Circuit Court of Sangamon County, State of Illinois, granted to me a final decree of divorce, on the ground that the defendant herein was guilty of extreme and repeated cruelty in the manner and form as charged in the complaint filed by me in said divorce action. I have been informed that a copy of said decree is attached to the complaint in the within action.

That by the terms of said decree, the defendant, R. Wells Leib, was ordered to pay to me the sum of $125.00 each month after the date of the entry of said decree, for so long as I remain unmarried or for so long as said decree remained in force and effect, unaltered and unmodified. That payments under the terms of said decree were made to me by said defendant to the first day of August, 1944. That on said date the defendant ceased to make further payments.

That on July 3, 1944, I entered into a ceremony of marriage with Walter J. Henzel, in Reno, Nevada. That
28 on or about August 3, 1944, Walter J. Henzel was served with a copy of a summons and complaint in an action instituted by Dorothy Henzel, as plaintiff, against said Walter J. Henzel, as defendant, in the Supreme Court of the State of New York, County of New York, for a decree separating said Dorothy Henzel, forever upon the ground of abandonment and cruel and inhuman treatment and on the further ground that a decree of divorce procured by said Walter J. Henzel, against said Dorothy Henzel, in the County of Washoe, State of Nevada, on July 3, 1944, was void and without force and effect.

That, immediately upon being informed of service of said summons and complaint, relations between Walter J. Henzel and myself ceased. This was on or about August 3,

1944, one month after the performance of the marriage ceremony in Reno, Nevada.

That, on or about June 22, 1945, a decree or judgment was entered in the Office of the Clerk of the County of New York, State of New York, whereby it was ordered, adjudged and decreed, that the decree of divorce procured by Walter J. Henzel, against Dorothy Henzel in the County of Washoe, State of Nevada, on July 3, 1944, be declared null and void and without force and effect, and that the plaintiff Dorothy Henzel, be separated from the bed and board of Walter J. Henzel forever. That attached hereto, and made a part of this affidavit, is an exemplified copy of this decree.

That, in the month of January, 1945, I instituted an action in the Supreme Court, State of New York, County of New York, for a decree or judgment ordering and directing that my said marriage to Walter J. Henzel, in Reno, Nevada, be annulled on the ground that it was void from the time of its inception. That the prosecution of said action was held in abeyance pending the trial of the aforesaid action brought by Dorothy Henzel against Walter J. Henzel, in Reno, Nevada, to be an annulity and void.

29 That, pending the prosecution of this action, a motion was made in my behalf for an order directing said Walter J. Henzel to pay to me alimony Pendente Lite and Counsel fees. This motion came on to be argued before Mr. Justice Gavegan, and on or about September 23, 1946, said motion was denied on the ground that the marriage between myself and Walter J. Henzel, was void ab initio.

That, on or about March 18, 1947, the action brought by me against Walter J. Henzel for the annulment of my marriage to him because of the previous valid existing marriage between Walter J. Henzel and Dorothy Henzel came on to be heard before Mr. Justice Valente, in the Supreme Court, State of New York, County of New York. Walter J. Henzel failed to appear in said action, and judgment by default was granted on or about April 22, 1947. That, thereafter said Walter J. Henzel made a motion to open and set aside said default. Said motion was granted. That on or about May 22, 1947 the said action for annulment regularly came on to be heard before Mr. Justice Benedict Dineen, at Special Term, Part VI of the Supreme Court, held in and for the County of New York, State of New York. The defendant, Walter J. Henzel, appeared by an

attorney. The issues were duly tried before the said Mr. Justice Dineen. That, on or about June 6, 1947, said Justice made and filed in the Office of the Clerk of the County of New York, State of New York his Findings of Fact and Conclusions of Law, that I was entitled to a judgment declaring the marriage between myself and Walter J. Henzel, to be a nullity, because of the prior valid existing marriage of the defendant Walter J. Henzel to Dorothy Henzel. That on June 6, 1947 Mr. Justice Dineen, signed an interlocutory judgment, wherein and whereby it was adjudged and decreed that I was entitled to a judgment annulling the marriage between myself and the defendant Walter J. Henzel, and declaring the same to be null and void. That this judgment became final as a matter of course three (3) months after the entry of the filing thereof. Attached hereto and made a part of this affidavit is an exemplified copy of said decree or judgment.

That on November 21, 1947, I married Sherwood Sutton and we are still husband and wife.

It is deponent's contention, that her attempted marriage to Walter J. Henzel, at Reno, Nevada, was invalid and absolutely void from its inception, and was so declared by a judgment of the Supreme Court of the State of New York after due trial and deliberation. That the judgment or decree entered in the Circuit Court of Sangamon County, State of Illinois, was not revoked by the subsequent attempted invalid marriage of deponent in Reno, Nevada, that the only means by which said decree may be vacated is by deponent entering into a valid marriage, which deponent did on November 21, 1947, when she married Sherwood Sutton; that R. Wells Leib, the defendant herein, by the provisions and terms of said decree, is in default in payment of alimony from August 1, 1944 to November 21, 1947, amounting to Five Thousand ($5000.00) Dollars with interest.

Verna Leib Sutton.

Sworn to before me, this 19th day of May, 1950.
(Seal) Fritzi V. Goldstein.
Fritzi V. Goldstein,
Notary Public, State of New York,
No. 31-1492200
Qualified in New York County,
Cert. filed with N. Y. Co. Clk. & Reg.
Commission expires March 30, 1951

State of New York, } ss.
County of New York. }

Form 1

No. 27942

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal Do Hereby Certify that Fritzi V. Goldstein, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 19 day of May, 1940.

Fee Paid 25¢

Archibald R. Watson,

(Seal) *County Clerk and Clerk of the Supreme Court, New York County.*

31 Exhibit "A".

The People of the State of New York:

By the Grace of God Free and Independent.

To All to Whom These Presents Shall Come or May Concern, Greeting:

Know Ye, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain judgment there remaining, in the words and figures following, towit:
(Seal)

State of New York, } ss.
County of New York. }

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the attached paper, consisting of 4 pages, with the original thereof filed in my office and that same is a correct transcript of the original and of the whole thereof.

In Witness Whereof I have hereunto set my hand and affixed my official seal.

Not valid without seal upon each page.

May 19, 1950.
(Seal)

/s/ Archibald R. Watson.

At a Special Term, Part V, of the Supreme Court, held in and for the County of New York, at the Court House thereof, situated at Center and Pearl Streets, New York City, on the day of May, 1945.

Present:

Hon. Aaron J. Levy,
Justice.

32 Dorothy Henzel,
Plaintiff,
against
Walter J. Henzel,
Defendant.

The above entitled action having duly come on to be tried in its regular order before the Court at a Special Term, Part V of the Supreme Court, New York County on the 3rd and 4th days of May, 1945, and upon the said trial the plaintiff having appeared by Jacob Hirsch, Esq., her attorney, and the defendant having appeared by Baker & Rosen, Esqs., his attorneys, A. David Rosen, Esq. of counsel, and the plaintiff having presented proof in support of her cause of action herein, and the defendant having produced proof in support of his defense therein, and the Court having heard all the evidence on the part of both parties hereto, and after due deliberation, the Court having made its Findings of Fact and Conclusions of Law,

Now, on motion of Jacob Hirsch, Esq., attorney of the plaintiff, it is

Ordered, Adjudged and Decreed that the plaintiff, Dorothy Henzel, be and she hereby is separated from the bed and board of the defendant, Walter J. Henzel, forever, upon the ground of defendant's abandonment, and cruel and inhuman

—1—

treatment of the plaintiff, and his failure to provide for and support her and the issue of the said marriage, and it is further

Ordered, adjudged and decreed that the decree of divorce heretofore procured by the defendant against the plaintiff in the County of Washoe, State of Nevada, on the 3rd day of July, 1944, is hereby declared to be null and void,
33 and without force and effect, and it is further

Ordered, Adjudged and Decreed that the affirmative defenses contained in the answer of the defendant, be and the same hereby are dismissed, and it is further

Ordered, Adjudged and Decreed that he plaintiff herein is entitled to the custody of the issue of the said marriage, to wit Anne Henzel, age fourteen years, and Floyd Henzel, age eleven years, and it is further

Ordered, Adjudged and Decreed that the defendant, Walter J. Henzel, pay to the plaintiff Dorothy Henzel, during her life, the sum of Fifty ($50) Dollars on Friday of each and every week, the payments to commence as of the 4th day of August, 1944, which is the date of commencement of this action, giving due credit to the defendant for such voluntary payment made to the plaintiff, or payments of alimony pendente lite as were made during the pendency of this action, to be paid at the plaintiff's residence, 150-31—60th Avenue, Flushing, Long Island, New York, or such other address as may be designated by her to him in writing, as permanent alimony for the support of the plaintiff, and for the support and maintenance and education of the issue of said marriage, to wit, Anne Henzel and Floyd Henzel, and it is further

Ordered, Adjudged and Decreed that the plaintiff recover of the defendant the costs of this action in the sum

—2—

of $126.10, to be taxed by the Clerk of this Court, and to be inserted herein by the Clerk, and that the plaintiff have execution therefor.

Enter

AJL
J. S. C.

34 /s/ Archibald R. Watson, *Clerk.*

Issue of Marriage

Anne Henzel age 14
Floyd Henzel age 11

Plaintiff's address
150-31—60th Av
Flushing, L. I., N. Y.

Defts address
1023—Third Ave.
Man. NYC.

(Stamp) Filed Jun 22 '45 New York CC Clerk's Office

(Stamp) Certified Copy Issued Date Jun 22, 1945
Fee 1.60 (2) Clerk M
(Stamp) Certified Copy Issued Date Oct. 25, 1946
Fee 70 Clerk 9
(Stamp) Certified Copy Issued Date Nov 7, 1945
Fee 70 Clerk H

Sir:

Please Take Notice that the within is a true copy of a this day duly filed and entered in the office of the clerk of the

Dated, N. Y., 194

Yours, etc.,
Jacob Hirsch,
Attorney for .....
(Ofc. & P. O. Address)
280 Broadway,
Borough of Manhattan,
N. Y. 7, N. Y.

to Esq.
Attorney for

File No. 14387 1944

Supreme Court; New York County.

Dorothy Henzel,
Plaintiff,
against
Walter J. Henzel,
Defendant.

Filed and Docketed June 22, 1945 at 3:06 P. M.

Judgment of Separation With Notice of Settlement

Sir:

Please Take Notice that the judgment of separation of which the within is a true copy, will be presented for settlement and entry herein to Mr. Justice Aaron J. Levy, one of the Justices of the within named Court at Special Term Part V, Superior Court, N. Y. County, Borough of Manhattan in the City of New York on the day 14 of May, 1945 at 10 o'clock in the forenoon.

Dated, N. Y., May 10, 1945.

Yours, etc.,
Jacob Hirsch,
Attorney for Pltf.
(Ofc. & P. O. Address)
280 Broadway,
Borough of Manhattan,
N. Y. 7, N. Y.

to Esq.,
Attorney for

Jacob Hirsch
Attorney for Plaintiff
(Ofc. & P.O. Address)
280 Broadway
Borough of Manhattan NY7, NY

To Esq.,
Attorney for

Service of a copy of the within is hereby admitted.
Dated N. Y., May 10, 1945
/s/ A. David Rosen
Attorney for Defendant.

(Stamp) Photostat Copies Issued Stub No. 64354 Pages Total Pages 4 May 19, 1950 County Clerk, N. Y. By B

(Stamp) Special Term Part 1 Paper Submitted Feb 21, 1946 Numbered 7

(Stamp) Fee Paid 25c Stub No. 17174 Jun 21, 1945 County Clerk N. Y. County By J Cashier

(Stamp) Special Term Part 1 Paper Submitted Numbered 4

Recorded June 23, 1945, Photostat Div., New York County Clerk's Office.

36 · All of which we have caused by these presents to be exemplified and the Seal of our said County and Supreme Court to be hereunto affixed.

Witness, Hon. William C. Hecht, Jr., a Justice of the Supreme Court of the State of New York of the County of New York, the 19th day of May in the year of our Lord one thousand nine hundred and fifty, and of our independence the one hundred and seventy-fourth.

/s/ Archibald R. Watson,
(Seal) *County Clerk and Clerk of the Supreme Court, New York County.*

I, William C. Hecht, Jr., a Justice presiding at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Archibald R. Watson, whose name is affixed to the preceding exemplification is the Clerk of the County of New York, and Clerk of the Supreme Court for said County, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said County and of the Supreme Court, and that the attestation thereof is in due form and by the proper officer.

Dated, New York, May 19th, 1950.

/s/ William C. Hecht, Jr.,
Justice of the Supreme Court of the State of New York.

State of New York, }
County of New York. } ss.:

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court of the State of New York, County of New York, do hereby certify that Hon. William C. Hecht, Jr., whose name is subscribed to the preceding certificate is a Justice presiding at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and qualified, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Court this 19th day of May, 1950.

/s/ Archibald R. Watson,
(Seal) *County Clerk and Clerk of the Supreme Court, New York County.*

37 Exhibit "B".

The People of the State of New York:

By the Grace of God Free and Independent to All to Whom These Presents Shall Come or May Concern, Greeting:

Know Ye, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain judgment there remaining, in the words and figures following, towit:
(Seal)

State of New York, } ss.
County of New York. }

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the attached paper, consisting of 3 pages, with the original thereof filed in my office and that same is a correct transcript of the original and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

May 19, 1950.
(Seal)
/s/ Archibald R. Watson.

Not Valid Without Seal Upon Each Page.

At a Special Term, Pat VI of the Supreme Court, held in and for the County of New York, at the Courthouse in the Borough of Manhattan, City of New York, on the 6 day of June, 1947.

Present:

Hon. Benedict D. Dineen, Justice.

38 Special Term Part VI

June 6, 1947

No. 31549—1946

Verna Lee Henzel,
Plaintiff,

—against—

Walter J. Henzel,
Defendant.

This action brought by the plaintiff for the annulment of her marriage to the defendant because of the previous, valid, existing marriage of the defendant, having duly come on to be tried before this Court at a Special Term Part VI held in and for the County of New York, at the Courthouse, Foley Square Borough of Manhattan, City of New York, on the 22nd day of May, 1947, and the plaintiff having appeared by Isidor Neuwirth, Esq., and the defendant by J. Preston Nottur, Esq., and the defendant having pursuant to stipulation and with the approval of the Court, withdrawn his answer to the complaint herein, and the issues having been duly tried before the undersigned without a jury, and judgment having been awarded to the plaintiff;

And the Court having on the 6th day of June, 1947, made and filed in the office of the Clerk of the County of New York, his findings in writing, stating separately the facts found and the conclusions of law, deciding that plaintiff is entitled to judgment against the defendant declaring the nullity of the marriage between the parties hereto, pursuant to statute, because defendant had another wife living at the time of said marriage,

Now on motion of Isidor Neuwirth, Esq. attorney for

the plaintiff, it is

Ordered, Adjudged and Decreed that the plaintiff is
39 entitled to a judgment annuling the marriage between the plaintiff and defendant and declaring the same null and void and freeing the parties from the obligation thereof.

Ordered, Adjudged and Decreed that this judgment is interlocutory, but shall become the final judgment as of course three months after the entry and filing hereof, unless for sufficient cause the court in the meantime shall have otherwise ordered. Upon this judgment becoming the final judgment, the said marriage shall be annuled and declaring the same null and void, and the parties shall thereby be freed from the obligations thereof.

Enter

B. D. D.
J. S. C.
/s/ Archibold R. Watson, *Clerk.*

Issue of Marriage—None

Plaintiff's address 135 East 63 St., New York City

Certificate of County Clerk

State of New York, } ss.
County of New York. }

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, Do Hereby Certify that the foregoing interlocutory judgment of annulment has become final.

In Witness Whereof, I have hereunto set my hand this 10 day of September, 1947.

/s/ Archibald R. Watson,
County Clerk and Clerk of the Supreme Court, New York County.

Certified Copy Issued
Date Sep 23, 1947
Fee 50 cents
Clerk G

Sir:

Please take notice that the within judgment will be presented for signature to Mr. Justice Dineen at the Office of the Clerk of Special Term Part VI, in the Court House, Foley Square, New York City, on the 5th day of June, 1947.

Dated, New York, June 2, 1947.

Yours, etc.,
Isidor Neuwirth,
Attorney for Plaintiff.

To: J. Preston Mottur, Esq.,
Attorney for Defendant.

Copy Received
June 2nd, 1947
/s/ J. Preston Mottur
by Wm. Mottur
Attorney for Defendant.

(Stamp) Recorded Jun 11 1947 Photostat Div. New York County Clerk's Office.

(Stamp) Filed Jun 10 '47 New York CC Clerk's Office.

No. 31549—1946

Supreme Court—New York County

Verna Lee Henzel,
Plaintiff,

—against—

Walter J. Henzel,
Defendant.

Filed June 10-1947 at 2 P. M.
Judgment With Notice of Settlement.
Isidor Neuwirth,
Attorney for Plaintiff,
50 Court St., B'klyn 2, N. Y.

(Stamp) Photostat Copies Issued Stub No. 64353 Pages Total Pages 3 May 19 1950 County Clerk, N. Y. By B

All of which we have caused by these presents to be exemplified and the Seal of our said County and Supreme Court to be hereunto affixed.

Witness, Hon. William C. Hect, Jr., a Justice of the
41 Supreme Court of the State of New York for the County of New York, the 19th day of May in the year of our Lord one thousand nine hundred and fifty, and of our independence the one hundred and seventy-fourth.

/s/ Archibald R. Watson,
County Clerk and Clerk of the Supreme Court, New York County.

(Seal)

I, William C. Hecht, Jr., a Justice presiding at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Archibald R. Watson whose name is affixed to the preceding exemplification, is the Clerk of the County of New York, and Clerk of the Supreme Court of said County, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the Seal of our said County and of the Supreme Court, and that the attestation thereof is in due form and by the proper officer.

Dated, New York, May 19th, 1950.

/s/ William C. Hecht, Jr.
Justice of the Supreme Court of the State of New York.

State of New York, }
County of New York. } ss.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court of the State of New York, County of New York, do hereby certify that Hon. William C. Hecht, Jr., whose name is subscribed to the preceding certificate is a Justice presiding at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and qualified, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Court this 19th day of May, 1950.

/s/ Archibald R. Watson,
County Clerk and Clerk of the Supreme Court, New York County.

(Seal)

Indorsed: Filed May 29, 1950. G. W. Schwaner, Clerk.

42 IN THE UNITED STATES DISTRICT COURT.
(Caption—1134)

AFFIDAVIT.

Howard R. Blalock, being first duly sworn on oath deposes and says that on Monday, May 29th, 1950, he personally delivered an exact copy of the attached Reply to Motion to Dismiss with Accompanying Affidavits in the above-entitled case to A. M. Fitzgerald, Attorney for the defense, at his office, 524 East Monroe Street, Springfield, Illinois.

Howard R. Blalock.

Subscribed and Sworn to Before me this 29th day of May, A. D. 1950.

G. W. Schwaner,
Clerk, U. S. District Court.

(Seal)

Indorsed: Filed May 29, 1950. G. W. Schwaner, Clerk.

43 The Clerk omits at this point Item No. 5 of Appellant's Designation of Contents of Record on Appeal for the reason that said documents were never filed in the office of the Clerk.

44 And afterwards, to wit: on the 5th day of June, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Monday, June 5, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

* * (Caption—1134) * *

It is ordered by the court that leave be and is hereby given the defendant herein to file an amendment to the motion to dismiss by the addition of a prayer for summary judgment.

45 And afterwards, to wit: on the 5th day of June, A. D. 1950, there was filed in the office of the clerk of said court, a certain Amendment of Motion to Dismiss by Addition of Prayer for Summary Judgment, which said Amendment, together with proof of service thereof, was and is in the words and figures, following, to wit:

46 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—1134) * *

AMENDMENT OF MOTION TO DISMISS BY ADDITION OF PRAYER FOR SUMMARY JUDGMENT.

Now comes the defendant, R. Wells Leib, by A. M. Fitzgerald, his solicitor, pursuant to leave first asked and obtained, and amends the Motion to Dismiss heretofore filed in this cause, in the following particulars:

(1) By entering the general appearance of the defendant for the purposes herein disclosed of moving for summary judgment.

(2) By striking from the Motion heretofore filed, the word "accordingly" being the last word of said Motion.

(3) By substituting in lieu and in place of said word "accordingly", the following:

"In bar of said action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law."

(4) That the complete prayer of the Motion heretofore filed as now, amended, be so amended so as to read in its entirety as follows:

"Wherefore the defendant moves that the said Complaint and cause of action be dismissed for want of jurisdiction, and that in the alternative if the court finds that it has jurisdiction, then that summary judgment in bar of said action on the ground that there is no genuine issue as to any material matter of law, as to the entire cause
47 of action alleged in the complaint herein in accordance with Rule 56 (b) of Federal Court Rules."

R. Wells Leib,
Defendant.

(Seal)

A. M. Fitzgerald,
Attorney for Defendant.

Subscribed and Sworn to before me this 3rd day of June, 1950.

Wm. F. Fuiten,
Notary Public.

Indorsed: Filed June 5, 1950. G. W. Schwaner, Clerk.

48 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—1134) * *

PROOF OF SERVICE.

A. M. Fitzgerald, being first duly sworn on oath deposes and says that on Saturday, June 3, 1950, he mailed a complete copy of the within attached Amendment, in the above entitled case, to Howard Ralph Blalock, whose address is 1404 South 11th Street, Springfield, Illinois, properly addressed to him at that address, and to F. T. Carson Law Offices, Joseph R. Carson, of Counsel, 102 East Main Street, Urbana, Illinois, with the required and sufficient amount of United States Postage, first class, placed upon the envelope containing said Amendment, and deposited in the United States mail at Springfield, Illinois.

A. M. Fitzgerald.

Subscribed and Sworn to before me this 3rd day of June, A. D. 1950.

Wm. F. Fuiten,
(Seal) *Notary Public.*

Indorsed: Filed June 5, 1950. G. W. Schwaner, Clerk.

49 And afterwards, to wit: on the 16th day of June, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Reply to Motion to Dismiss, with Accompanying Affidavits, which said Reply was and is in the words and figures, following, to wit:

50 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—1134) * *

REPLY TO MOTION TO DISMISS, WITH ACCOMPANYING AFFIDAVITS.

Now comes the plaintiff, Verna Leib Sutton, by F. T. Carson Law Offices, by Joseph R. Carson, of counsel, Howard R. Blalock and Jean S. Sheppard, her attorneys, and in reply to Defendant's Motion to Dismiss, states as follows:

1. Plaintiff denies the allegations contained in Paragraph One of Defendant's Motion to Dismiss.

2. Plaintiff denies the allegations contained in Paragraph Two of Defendant's Motion to Dismiss.

3. Plaintiff denies the allegations contained in Paragraph Three of Defendant's Motion to Dismiss.

4. Plaintiff denies the affirmative matters contained in Paragraph Four in part and states that while she went through a marriage ceremony with one Walter J. Henzel in Reno, Nevada, on July 3, 1944, that this marriage was subsequently declared null and void and of no legal effect by decree of the Supreme Court of New York on June 6, 1947, at which time the aforesaid Supreme Court of New York, sitting in the County of New York, State of New York granted the plaintiff a decree of annulment and an exemplified copy of this decree is herewith attached
51 as Plaintiff's Exhibit "B". Plaintiff further states that the wife of the said Walter J. Henzel secured a decree of separation from said Walter J. Henzel on June 22, 1945, in the Supreme Court of the County of New York, State of New York, in which decree the Court declared a previous Reno, Nevada divorce secured by said Walter J. Henzel to have been void an exemplified copy of which is herewith attached as plaintiff's Exhibit "A". Plaintiff further denies that she cohabited with the said Walter J. Henzel from July 3, 1944, until the month of November, 1947, and states that upon the filing of a complaint for separation by Dorothy Henzel against Walter J. Henzel, on August 3, 1944, the plaintiff and said Walter J. Henzel ceased cohabiting, all of which matters appear more fully in an affidavit executed by the plaintiff and herein attached.

5. Plaintiff admits the allegations contained in Paragraph five which states that the decree in the Circuit Court of Sangamon County, Illinois, has never been modified, set aside or reversed but denies that the court lacks jurisdiction to hear these matters.

Wherefore, the plaintiff prays that the Motion to Dismiss be overruled.

Verna Lieb Sutton,
Plaintiff.

State of New York, }
County of New York. } ss.

Verna Leib Sutton, being first duly sworn upon her oath deposes and states that she has read the above and foregoing Reply to Motion to Dismiss with Accompanying Affidavits, by her subscribed, knows the contents thereof, and that the same are true in substance and in fact.

Verna Lieb Sutton.

Fritzi V. Goldstein,
Notary Public, State of New York,
No. 31-1492200,
Qualified in New York County,
Cert. filed with N. Y. Co. Clk. & Reg.
Commission expires March 30, 1951.

Subscribed and sworn to before me this 31st day of May, A. D. 1950.

Fritzi V. Goldstein,
Notary Public.

52 Joseph T. Carson,
Attorney,
102 East Main Street,
Urbana, Illinois.

Howard R. Blalock,
Attorney,
1404 South 11th Street,
Springfield, Illinois.

Jean S. Sheppard,
Attorney,
303 East Washington Street,
Bloomington, Illinois.

State of New York, }
County of New York. } ss.

No. 31191.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify that Fritzi C. Goldstein whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment of proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 31 day of May, 1950.

Archibald R. Watson,
County Clerk and Clerk of the Supreme Court, New York County.

Indorsed: Filed June 16, 1950. G. W. Schwaner, Clerk.

53 And afterwards, to wit: on the 16th day of June, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Friday, June 16, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

* * (Caption—1134) * *

This cause coming on to be heard by the court on the amended motion to dismiss and for summary judgment, said cause is submitted on defendant's amended motion and taken under advisement by the court.

54 And afterwards, to wit: on the 21st day of August, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Opinion of the Court, which said Opinion was and is in the words and figures, following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1134) * *

Before Charles G. Briggle, United States District Judge.

Appearances:

Joseph R. Carson, Urbana, Illinois; Jean S. Sheppard, Urbana, Illinois; Howard R. Blalock, Springfield, Illinois, for the Plaintiff.

A. M. Fitzgerald, Springfield, Illinois; Walter T. Day, Springfield, Illinois, for the Defendant.

OPINION.

Plaintiff sues defendant to recover accrued payments of alimony under a certain decree of divorce rendered by the Circuit Court of Sangamon County, Illinois, on October 11, 1939. This decree, among other things, provides that the defendant shall on or before the first day of each month pay the plaintiff the sum of $125.00, continuing "so long

as plaintiff shall remain unmarried or for so long as this decree remains in full force and effect, unaltered and unmodified." Plaintiff, a resident of New York, asserts that there is due her under this decree, accrued monthly installments from August 1, 1944, to November 1, 1947, amounting to $5000.00 and brings suit against the defendant, a resident of Illinois. This is met by a motion by the defendant to dismiss for want of jurisdiction, chiefly on the grounds that the complaint raises the question of the construction and effect of a divorce decree, and that the Federal Court is without jurisdiction to act concerning the marital status of the plaintiff and defendant. Alternatively, defendant's motion as amended prays for a summary judgment. The motion is supported by the affidavit of the
56 defendant which discloses that the defendant has paid to the plaintiff all sums required to be paid under said decree of divorce to August 1, 1944, and that the plaintiff on July 3, 1944, at Reno, in the State of Nevada, was remarried to one Walter J. Henzel. Certified copies of the application for marriage license are attached to such affidavit and disclose that the said Walter J. Henzel was divorced at Reno, Nevada, on July 3, 1944, and that Verna L. Crawford was divorced at Springfield, Illinois. A certified copy of the return of Reverend Brewster Adams, pastor of the Baptist Church, discloses that he married Walter J. Henzel of Reno, Nevada, and Verna L. Crawford of New York City, on July 3, 1944, at Reno, Nevada. It appears without dispute that Verna L. Crawford was formerly the wife of defendant and is now Verna Leib Sutton, the plaintiff herein.

Defendant's affidavit attached to his motion further discloses that the plaintiff after her marriage in Nevada to Walter J. Henzel demanded of the defendant that he make the alimony payments provided by said decree for the months of June and July, 1944, (which apparently at that time had not been made in full), and informed the defendant that his information concerning her remarriage was correct; that pursuant to said demand by plaintiff, defendant paid to the plaintiff the sum of $180 and plaintiff through her counsel acknowledged receipt thereof in full of all claims that she had under said decree of divorce. Attached to the affidavit are also copies of correspondence between counsel for plaintiff and counsel for defendant supporting such statement in the affidavit.

Plaintiff by leave of court has filed a reply to the Motion to Dismiss and counteraffidavits. In the plaintiff's counteraffidavit she admits that she entered into a marriage ceremony with Walter J. Henzel on July 3, 1944, at Reno, Nevada; that at a later date, one Dorothy Henzel who was apparently a former wife of Walter J. Henzel sued the said Walter J. Henzel in the State of New York for a separation decree, and that on June 22, 1945, a decree was entered, a certified copy of which is attached to the counter-affidavit, in which it appears that Dorothy 57 Henzel obtained a decree of separation from the said Walter J. Henzel, and in which it is recited that the decree of divorce heretofore procured by the said Walter J. Henzel in the State of Nevada on July 3, 1944, is null and void. The plaintiff's counteraffidavit further discloses that in the month of January, 1945, she instituted an action in the Supreme Court of New York, praying that her marriage to Walter J. Henzel be declared null and void, and in this suit a decree was entered by the New York Court in June, 1947, decreeing that the plaintiff is entitled to a judgment annulling the marriage between the plaintiff and the said Walter J. Henzel, and that such judgment should become final three months from its entry, unless otherwise ordered. Plaintiff's affidavit further discloses that she was married to one Sherwood Sutton, but does not challenge the assertion of defendant's affidavit concerning the payment of $180.00 in full release of his obligations under the divorce decree of Sangamon County.

It thus appears that the Court is confronted with a suit for alleged past due payments of alimony under the Sangamon County, Illinois, decree; that one Henzel obtained a decree of divorce at Reno, Nevada, on July 3, 1944, and on the same date married the plaintiff in this proceeding; that afterwards plaintiff demanded that defendant, who apparently had made all alimony payments up to June 1, 1944, pay her alimony for the months of June and July, 1944, and advised defendant that she had remarried. Defendant responded to this request and made such payments and the plaintiff released the defendant from the alimony provisions of the Illinois decree. Later, a New York Court held that the Reno divorce of Henzel was void and awarded a decree to his wife (not plaintiff here) in the State of New York, and still later the present plaintiff obtained a decree in New York holding her marriage to Henzel to

be a nullity. The plaintiff now asserts a liability against defendant for all alimony payments accruing from August 1, 1944, up to the date of her marriage to Sutton on November 21, 1947. It thus appears that there is no substantial or controlling disputed question of fact before the Court on Defendant's amended motion to dismiss or in the alternative for summary judgment.

The first question for consideration is the contention of defendant that this proceeding should be dismissed for want of jurisdiction. While it is true that the Court
58 would not have jurisdiction to in any sense modify or vary the terms of the divorce decree of the Circuit Court of Sangamon County, Illinois, yet that does not appear to be the purpose of this proceeding. This is a suit to recover the accrued payments of alimony alleged to be due plaintiff under the terms of the divorce decree. Under the law of Illinois, Plaintiff would appear to have a vested right in the payments thus decreed, *Craig* v. *Craig,* 163 Ill. 177; *Dinet* v. *Eigmann,* 80 Ill. 274; and *Hotzfield* v. *Hotzfield,* 336 Ill. App. 238; and no reason appears why such right cannot be asserted in the Federal Courts, other jurisdictional requirements being present.

A study of the cases of *Barber* v. *Barber,* 62 U. S. 582, *Sistare* v. *Sistare,* 218 U. S. 1, *Barber* v. *Barber,* 323 U. S. 77, and other cases, convinces the Court that it has jurisdiction of the subject matter of this proceeding, and the motion of defendant to dismiss for lack of jurisdiction should be denied.

Next for consideration is defendant's motion for summary judgment. It appears from the conceded facts that both parties at one time treated the Nevada divorce as a valid decree of the court of Nevada, and entered into a settlement of the alimony questions involved in the Illinois decree, but the plaintiff now contends that the New York decree, having invalidated the Nevada Decree so far as New York is concerned, that this court in giving full faith and credit to the New York decree under consideration, must hold that her marriage to Henzel was void from the beginning, and consequently defendant's liability for alimony under the Illinois decree was a continuing one until she married Sutton. The question of the validity of the Nevada decree of divorce which preceded Henzel's marriage to the plaintiff is not in issue in this proceeding and it is not challenged in this court except by the contention of the plaintiff that the court should accept the finding of

the New York court in that respect. While a Federal Court must give full faith and credit to the laws and decrees of other states, insofar as they are constitutional and insofar as they are entitled to credit in their respective states, yet it appears without dispute that a decree of divorce to Henzel was granted by the State of Nevada, and so far as appears in this proceeding it is a valid and binding decree in that state, and the subsequent marriage of plaintiff to Henzel in Nevada would consequently be presumed to be a valid marriage in the State of Nevada. It should be
59 remembered that defendant was not a party to the proceedings in either state.

We are thus confronted with two conflicting decisions of sister states, and it would be an incongruous situation for this Court to undertake to determine which, if either, of such decisions should in this proceeding be accorded full faith and credit. Fortunately we are not called upon to do so, as the parties themselves accepted the validity of the Nevada decree, and at a time when such decree had never been challenged, entered into a contract settling the question of accrued alimony. There is no question of fraud or overreaching in the settlement then made and no effort has been made to set the same aside. The settlement and release was handled at arms length by the parties through their respective counsel and no reason appears why it should not be held to be a binding obligation upon each. The mere fact that at a later date the plaintiff succeeded in gaining a decree of a New York court holding that her marriage to Henzel was void so far as New York is concerned can make no difference. Indeed, while not suggested in the briefs, the most that could be said for the settlement and release is that such settlement was made under a misapprehension of law and not by reason of any misunderstanding of fact or by reason of any fraud. If the parties misconceived the law they could not now be relieved of their voluntary act by reason of such mistake of law. That they then understood the law is to be presumed. Under such circumstances, I find that plaintiff is not entitled to relief and defendant's motion for summary judgment is allowed.

Counsel for defendant may prepare a judgment order and, after submitting same to counsel for plaintiff, present to the Court.

Chas. G. Briggle,
United States District Judge.

Indorsed: Filed Aug. 21, 1950. G. W. Schwaner, Clerk.

60 And afterwards, to wit: on the 21st day of August, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

61 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—1134)

JUDGMENT.

This cause having come on to be heard at this term upon the verified Complaint of the Plaintiff, Verna Leib Sutton, and the original Motion for a Summary Judgment of Dismissal, and the Amendment thereto, of the Defendant, R. Wells Leib, with supporting Affidavits of fact, and the Reply of the Plaintiff to such Motion to Dismiss, with accompanying Affidavits of fact, and the Court having read and considered the Complaint, the Motions to Dismiss, with supporting Affidavits of the uncontroverted facts and the cause having been argued in open court by counsel for the respective parties, and the Court having considered such pleadings, affidavits and arguments of counsel, and having been fully advised in the premises, and having thereafter rendered its written Opinion, Doth Find:

That there is no genuine issue as to any material fact, but that under Rule 52-a of the Rules of Civil Procedure, the action having been tried by the Court without a jury the following facts are especially stated, and the following conclusions of law thereon are accordingly here set forth, namely: that the Plaintiff, Verna Leib Sutton (formerly Verna Leib) obtained a decree of divorce in the Circuit Court of Sangamon County, Illinois, on October 11, 1939, which decree provided that the Defendant, R. Wells Leib, pay the Plaintiff the sum of One Hundred Twenty-Five Dollars ($125.00) monthly, "so long as the Plain-
62 tiff shall remain unmarried, or for so long as said decree remains in force, unaltered and unmodified"; that afterwards, on July 3, 1944, the said Verna Leib, Plaintiff herein, was married to one Walter J. Henzel, at Reno, Nevada, the said Walter J. Henzel having upon the same day and date obtained at Reno, Nevada, a decree for divorce from his wife, then a resident in the State of New York; that after the marriage of the Plaintiff to said

Walter J. Henzel, she, through her attorneys, demanded of the Defendant, R. Wells Leib, that he make the alimony payments provided by said Illinois divorce decree, for the months of June and July, 1944, and informing the Defendant, R. Wells Leib, of her remarriage to said Walter J. Henzel, and that pursuant to said demand, the Defendant, R. Wells Leib, paid to the Plaintiff the sum of One Hundred Eighty Dollars ($180.00), as in full discharge of all rights under said Illinois divorce decree, which payment was accepted by the Plaintiff, through her counsel, and a receipt and full release was delivered to and is now held by the Defendant, acknowledging full and complete satisfaction of all claims of the said Verna Leib (then Henzel, and now Sutton) under said Illinois decree of divorce; that on June 22, 1945, in an action instituted by Dorothy Henzel, former wife of Walter J. Henzel, said New York Court entered its decree reciting that the decree of divorce theretofore procured by Walter J. Henzel in the State of Nevada, on July 3, 1944, was null and void in the State of New York; that afterwards, in the month of June, 1947, the Plaintiff, Verna Leib Henzel (now Sutton) obtained a decree of annulment in the Supreme Court of New York to the effect that her marriage to said Walter J. Henzel was null and void; that both parties hereto at one time considered and treated the said Nevada divorce decree as a valid decree, and said Nevada marriage as a valid and subsisting contract of marriage, and accordingly entered into said settlement of the alimony payments provided by the Illinois decree; and that the contract of settlement of all alimony questions between the parties was entered into and said release delivered without any element of fraud or overreaching, and was not based upon any misapprehension of fact when so entered into, and that the
63 Plaintiff has not contended that such settlement was based upon any misapprehension of fact or fraud; the court accordingly finds that under the uncontroverted facts that the Plaintiff is not entitled to the relief in her Complaint prayed, and that the Defendant is entitled to the summary judgment in bar of the action of the Plaintiff, prayed in his Motion, and that the merits of this cause are against the Plaintiff and in favor of the Defendant herein.

It Is Accordingly ordered, adjudged and decreed, that said Complaint herein, be and the same is hereby dismissed for want of merit, with prejudice, and that the Plaintiff

take nothing by her suit, and is forever barred of further action, with costs to the Defendant, taxed and to be taxed by the Clerk of this Court.

Entered this 21st day of August, A. D. 1950.

Chas. G. Briggle,
Judge.

Indorsed: Filed Aug. 21, 1950. G. W. Schwaner, Clerk.

64 And afterwards, to wit: on the 22nd day of August, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Motion by Plaintiff for a New Trial, which said Motion was and is in the words and figures, following, to wit:

65 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1134) * *

MOTION BY PLAINTIFF FOR NEW TRIAL.

Now Comes the Plaintiff, Verna Leib Sutton, by Howard R. Blalock, Joseph R. Carson, and Jean S. Sheppard, her attorneys, and respectfully moves the Court that a new hearing be granted in the above-entitled cause, and as grounds for said motion shows as follows:

1. That the opinion issued by the Court, holding for the defendant in this cause, sets forth as the reason for said holding that correspondence between the attorney representing the plaintiff and the attorney representing the defendant showed that the parties by the payment of the sum of $180.00 settled all claims of the plaintiff against the defendant for alimony, both past and in the future.

2. That in the judgment subsequently issued by the court, it is set forth that the grounds for the judgment in favor of the defendant was the payment of the said sum of $180.00 "as in full discharge of all rights under said Illinois divorce decree, which payment was accepted by the Plaintiff, through her counsel, and a receipt and full release was delivered to and is now held by the Defendant, acknowledging full and complete sat-

66 isfaction of all claims of the said Verna Leib (then Henzel, and now Sutton) under said Illinois decree of divorce." That there has been newly discovered evidence consisting of an affidavit of A. David Rosen, an attorney who is a member of the bar of the State of New York, and

who represented the said Verna Leib Sutton at the time of the alleged complete release, which affidavit shows that it was not the intention of the parties at the time to release all claims of Verna Leib Sutton for alimony against the defendant, but rather that it was the intention of the parties, and the correct interpretation of the correspondence set forth in the Defendant's Motion to Dismiss with reference to said payment reveals that it was the intention of the parties and the purpose of the payment of $180.00 merely to pay the arrearage at that time due and owing under the said Illinois decree, and it did not take into consideration any contingencies which might arise in the future by acts of court or by the parties, which would renew the payments of alimony under said Illinois decree.

3. That the affidavit of the said A. David Rosen was previously not available to the plaintiff, but was sought after it became apparent that the court was to rely on the so-called settlement of all claims through the payment of $180.00 rather than upon the stated grounds for dismissal set forth in the Defendant's Motion to Dismiss; that there is attached hereto and made a part of this motion for new trial the affidavit of the said A. David Rosen, setting forth his knowledge of this occasion; that it appears from this affidavit that it was not the intention of the parties that all claims for alimony which might accrue in the future should be settled for $180.00, and that it further appears from this affidavit that all the correspondence taking place between the affiant and one Jerome Finkel of Springfield, Illinois, who at one time represented the defendant, 67 is not set forth in the motion and accompanying affidavits of the defendant, R. Wells Leib.

Wherefore, Plaintiff Prays that a new trial or hearing be granted to the plaintiff in this cause.

Verna Leib Sutton,
Plaintiff,
By Howard R. Blalock,
Joseph R. Carson,
Jean S. Sheppard,
Her Attorneys.

Howard R. Blalock, Attorney,
1404 S. Eleventh St.,
Springfield, Illinois,
Joseph R. Carson and
Jean S. Sheppard, Attorneys,
102 E. Main St.,
Urbana, Illinois.

68 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—1134)

State of New York, }
County of New York. } ss.

A. David Rosen, being duly sworn, deposes and says:

I am a member of the Bar of the State of New York and have been duly admitted and licensed to practice as an attorney and counsellor in all the courts of that state; having my office at #305 Broadway, Borough of Manhattan, City, County and State of New York.

In or about the month of August, 1944, I was engaged by the plaintiff named in the above entitled action solely and exclusively for the purpose of obtaining a payment of arrears in alimony then due from the defendant herein, R. Wells Leib, pursuant to a certain Decree of Divorce entered in favor of the plaintiff herein in the Office of the Clerk of the Circuit Court, Sangamon County, Illinois on or about October 11th, 1939.

That as a result of correspondence passing between me and Jerome Finkle of Springfield, Illinois, attorney for R. Wells Leib, the defendant named herein, wherein I
69 brought to the attention of Mr. Finkle that Mr. R. Wells Leib was indebted to the plaintiff herein for the accrued payments of alimony under the provisions of the aforesaid decree for the months of June and July of 1944, on or about September 8th, 1944 I received from Mr. Finkle a check made by Mr. Leib in the sum of $180. I acknowledged the receipt of said check and advised Mr. Finkle that it satisfied in full the then accrued payments of alimony due from the defendant herein to the former Mrs. R. Wells Leib, now known as Verna Leib Sutton the plaintiff herein.

That in acknowledging the receipt of the said $180 which represented accrued payments of alimony then due under the provisions of the aforesaid decree of divorce, it was not contemplated or within the understanding of counsel representing the respective parties, that this payment was to be considered or construed as a release from the payment of any claims that may arise in the future under the said Decree of Divorce, as long as it remained in force and effect and had not been modified by the court granting it.

I have read the opinion of the Hon. Charles G. Briggle, United States District Judge for the Southern District of Illinois granting the motion of the defendant herein for Summary Judgment, and note from a reading of the last to the concluding paragraph thereof, that the court granted such relief upon the sole ground that the transaction between me and said Jerome Finkle created a settlement and release of the payment of alimony in futuro. The only proper construction, or inference that can be placed upon or drawn in regard to the correspondence passing between me and Mr. Finkle, (all of which is not set forth in the defendant's motion herein to dismiss), I respectfully state is that the check for the $180 solely represented payment of accrued alimony existing as of August, 1944 and that it did not create a compromise, settlement or release for claims for payment of alimony in the event the right to such a claim should arise in the future. To hold otherwise would be absolutely contrary to the understanding had between counsel representing the respective parties and can not be borne out by the circumstances existing at the time the payment of the said $180 was made.

A. David Rosen.

Jesse W. Heller.

Sworn to before me this 21st day of July, 1950.

Jesse W. Heller,
Notary Public in the State of N. Y.
Qualified in Queens County.
No. 41-6842450
Cert. filed in Queens, Kings & N. Y. County Clerk's and Registers Off.
Commission expires Mar. 30, 1952

(Seal)

State of New York, } ss.
County of New York. }

Form 1

No. 47487

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify that Jesse W. Heller, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for loads, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 21st day of July, 1950.

Archibald R. Watson,
County Clerk and Clerk of the Supreme Court, New York County.

Fee Paid 25¢.

Indorsed: Filed Aug. 22, 1950. G. W. Schwaner, Clerk.

71 And afterwards, to wit: on the 28th day of August, A. D. 1950, there was filed in the office of the Clerk of said Court, certain Suggestions in Objection to Motion by Plaintiff for a New Trial, which said Suggestions were and are in the words and figures, following, to wit:

72 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—1134)

SUGGESTIONS IN OBJECTION TO MOTION BY PLAINTIFF FOR NEW TRIAL.

Comes now the defendant, R. Wells Leib, by A. M. FitzGerald, his attorney and in objection to the Motion of the plaintiff, says the following:—

(1) The Motion of the plaintiff is not based upon newly discovered evidence.

(2) The statements made in the affidavit of A. David Rosen, are not in accord with the understanding of the parties, and are purely unwarranted conclusions, as shown by the correspondence between the defendant R. Wells Leib, A. David Rosen, Baker and Rosen and Jerome R. Finkle, attorney for R. Wells Leib.

(3) The affidavits of the defendant R. Wells Leib and Jerome R. Finkle, hereto attached, clearly disclose that the finding of the Court is entirely proper and fully sustained by the facts.

(4) Affidavits of R. Wells Leib and Jerome R. Finkle, and letters and copies of leters as follows, are attached hereto; July 31, 1944, from Baker and Rosen, signed by A. David Rosen to R. Wells Leib; August 8, 1944, answer of Jerome R. Finkle to Baker and Rosen; August 10, 1944, letter from Baker and Rosen, signed by A. David Rosen to Jerome Finkle; August 14, 1944, reply of Jerome R. Finkle to Baker and Rosen; August 17, 1944, letter from Baker and Rosen, signed by A. David Rosen to Jerome R. Finkle; August 24, 1944, letter to Baker and Rosen from Jerome R. Finkle; August 29, 1944, letter of Baker and Rosen, signed by A. David Rosen to Jerome R. Finkle;

73 August 31, 1944, letter from Jerome R. Finkle to Baker and Rosen; September 8, 1944, from Baker and Rosen, signed by A. David Rosen, addressed to Jerome R. Finkle. These affidavits and letters clearly show that sef-

tlement was final and conclusive of all liability of the defendant to the plaintiff in this case. The Court's attention is called particularly to the statement in the letter of August 8th from Mr. Finkle to Messrs. Baker and Rosen, in which it is said: "It is our understanding that the former Mrs. Leib has remarried and that, under the terms of the divorce decree, no further sums are due her." That Mr. Rosen understood this is evidenced by his letter to Mr. Finkle of August 10th, in reply to Mr. Finkle's letter of August 8th: "Please be advised that your understanding of the re-marriage of our client Mrs. Verna Leib is correct and that said remarriage took place on the third day of July, 1944." In reply to that letter on August 14th, Mr. Finkle wrote to Baker and Rosen, and stated in the concluding paragraph the following: "Upon receiving a letter from you stating that $180.00 will be accepted in full settlement of alimony claims, my client will immediately send you a check in that amount."

On August 17th Baker and Rosen, in the letter addressed to Jerome R. Finkle, and signed by David Rosen, endeavoring to secure the full amount demanded of $250.00, the following: "* * * in order to get this matter disposed of you should send the check for $250.00, as Mr. Leib surely should be very happy at this time to know that her marriage has relieved him of any further obligations." On August 24th, in reply to that letter, and in refusing to pay the $250.00, Mr. Finkle wrote Baker & Rosen, as follows: "As stated in my former letter, Mr. Leib will be glad to send the $250.00 payments due less the $70.00 already lent or advanced upon your agreement to accept the same in full."

On August 29th Mr. Rosen replied to Mr. Finkle that he would accept the $180.00 and said: "In accordance with the closing paragraph in your letter of August 24th, I shall expect a check for the above sum as quickly as possible." On August 31st Mr. Finkle sent Baker and Rosen a check for $180.00, with the following statement: "pursuant to your letter of August 29th, as payment in full of alimony claim of Verna Crawford Henzel, the former Mrs. Leib."

74 And again on September 8th, Baker and Rosen, in a letter signed by A. David Rosen, wrote to Jerome R. Finkle the following letter: "This is to acknowledge re-

ceipt of the check in the sum of $180, made by R. W. Leib, payable to the order of Verna Crawford Henzel. This remittance satisfies in full the alimony claim of the former Mrs. Leib."

R. Wells Leib,
Defendant.

A. M. FitzGerald,
Attorney for Defendant,
504 East Monroe Street,
Springfield, Illinois.

75 State of Illinois, } ss.
County of Sangamon. }

Affidavit.

Jerome R. Finkle, being first duly sworn on oath says that he is a practicing attorney at the Bar of the State of Illinois, and has been such for many years last past; that he is now the Secretary of the Legislative Reference Bureau of the State of Illinois;

That heretofore he represented R. Wells Leib, in a suit filed by Verna Leib, his wife, in the Circuit Court of Sangamon County, Illinois, in which she procured a divorce from R. Wells Leib on October 11, 1939; that in the year 1944, Mr. R. Wells Leib brought to him a letter dated July 31, 1944, from the law firm of Baker and Rosen, of 545-5th Avenue, New York, N. Y., signed by A. David Rosen; that thereafter he carried on and had the correspondence which is identified in the Suggestions of the defendant, to which this affidavit and the letters referred to, are attached; that the carbon copies of letters attached are carbon copies of letters which were written by him and mailed to the office of Baker and Rosen, and to which replies were received from A. David Rosen, as shown; that the photostatic copies of letters attached are correct photostatic copies of letters received by him; that he is now and has been for more than twelve years last past, acquainted with Mrs. Verna Leib Sutton, who heretofore was married to Walter J. Henzel; that through his acquaintance and many discussions which he had with her at the time the divorce was obtained by her, and in view of the information which he has had in regard to her attitude towards her husband, it

was his intention and the intention of R. Wells Leib that at the time of the payment of money to her, through Messrs. Baker and Rosen, on August 31, 1944, to make a final and definite settlement in full of all claims of Mrs. Verna Leib (Henzel) Sutton under the divorce decree for alimony and in full satisfaction of all obligations of the defendant, R. Wells Leib, to the plaintiff Verna Leib (Henzel) Sutton, and that no payment would have been made upon any other basis.

That he has read the affidavit of A. David Rosen, attached to the Motion for new Trial, prior to the making of this affidavit, and he thinks that the present opinion of Mr. Rosen is not the opinion which Mr. Rosen had at the time of the correspondence, and at the time of the settlement, as is evidenced by the correspondence; that when the money was sent on August 31, 1944, to Mr. Rosen for Mrs. Leib, it was a payment in full of all of Mr. Leib's obligations forever to Mrs. Leib-Henzel.

Jerome R. Finkle.

Subscribed And Sworn to before me this 25th day of August, A. D 1950.

Wm. F. Fuiten,
Notary Pubiic.

(Seal)

76 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1134) * *

AFFIDAVIT.

R. Wells Leib, being first duly sworn on oath, deposes and says that he is the defendant in the above entitled cause; that in July, 1944, after he had received a letter from A. David Rosen, in regard to the claim for alimony of the plaintiff in this case, he took this letter to Jerome E. Finkle and directed Jerome E. Finkle to reply to it; that from time to time he conferred with Mr. Finkle and saw the correspondence which is filed with the Objection to the Motion by Plaintiff for New Trial, in this case; that at the time of the payment on August 31st to the plaintiff, who was then, as he understood, Mrs. Verna Henzel, he directed that this payment be made only in the event that it was a final and definite settlement of all of

his obligations to his former wife, who was then Mrs. Verna Henzel, as he understood; that he would have made no payment to her under any other circumstances.

R. Wells Leib.

Subscribed And Sworn to before me this 25th day of August, A. D. 1950.

(Seal) Wm. F. Fuiten.

77 Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
MUrray Hill 2-1455
July 31st, 1944.

Mr. R. Wells Leib,
c/o Franklin Life Insurance Co.,
Springfield, Ill.

Dear Mr. Leib:

Our client, Mrs. Verna Leib, informs us that you are in arrears in the sum of $250.00 representing Alimony payments for the months of June and July, 1944, at the agreed rate of $125.00 per month.

Will you please see to it that this amount due is paid immediately. In the event that such payment is not received on or before August 10th we will be compelled to institute necessary proceedings to enforce the collection of same.

Very truly yours,
Baker & Rosen,
By A. David Rosen.

ADR:MB

78 August 8, 1944.

Baker and Rosen,
Attorneys at Law,
545 Fifth Avenue,
New York 17, New York.

Gentlemen:

Mr. R. Wells Leib has referred to me your letter of July 31st relative to the claim of his former wife that he is in arrears in the sum of $250.00 representing alimony payments for June and July, 1944. It is our understanding that the former Mrs. Leib has remarried and that, under the terms of the divorce decree, no further sums are due her.

Very truly yours,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

JF:LW

79 Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
MUrray Hill 2-1455
August 10, 1944.

Jerome Finkle, Esq.,
c/o Knotts & Dobbs,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

Dear Sir:

Please be advised that your understanding of the re-marriage of our client Mrs. Verna Leib is correct and that said re-marriage took place on the third day of July, 1944.

However, the alimony payments for the months of June and July, 1944 are still due and payable under the terms of the Divorce Decree which provided for payments of alimony, the first of each month until she re-marries.

We shall expect the check in full settlement by return mail otherwise we shall be compelled to enforce the collection of the amount due.

Very truly yours,
Baker and Rosen,
A. David Rosen.

80 August 14, 1944.

Baker and Rosen,
Attorneys at Law,
545 Fifth Avenue,
New York 17, New York.

Gentlemen:

Thank you for your letter of August 10th relative to the matter of alimony payable to the former wife of R. Wells Leib. We agree that the June payment is due and that under a technical construction of the decree the July payment is also due. Because of this, my client, Mr. Leib, is very willing to settle on the basis of $250.00 but as money in the sum of $70.00 was lent by Mr. Leib to his former wife after the divorce and has not been repaid, we feel that the sum of such loans must be deducted from the $250.00 of alimony payable. This sum of $70.00 consists of $25.00 lent in November, 1939, $20.00 in January, 1940, and $25.00 in May, 1940.

Upon receiving a letter from you stating that $180.00 will be accepted in full settlement of alimony claims my client will immediately send you a check in that amount.

Very truly yours,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

JF:LW

81 Baker and Rosen
David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
MUrray Hill 2-1455

August 17, 1944.

Jerome E. Finkle, Esq.,
Knotts & Dobbs,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

Dear Sir:

Your letter of August 14 in hand, and contents duly noted. Upon receipt of same we got in touch with our client who was astounded at the information that she had borrowed in November, 1939, $25.00; in January, 1940, $20.00; and in May, 1940, $25.00. She says that if such events had ever taken place during the past five years, Mr. Leib surely would have deducted the same from past payments which she obtained from him after repeated efforts to collect.

However, if you have any letters from her showing the request for these loans, we will get our client to acknowledge the same. If, on the other hand, there are no such letters, then we suggest that in order to get this matter disposed of you should send the check for $250.00, as Mr. Leib surely should be very happy at this time to know that her marriage has relieved him of any further obligations.

Hoping that the matter will be adjusted along the above lines by return mail, allow us to remain

Very truly yours,
Baker and Rosen,
A. David Rosen.

ADR dem

82 August 24, 1944.

Baker and Rosen,
Attorneys at Law,
545 Fifth Avenue,
New York 17, New York.

Gentlemen:

Pursuant to your letter of August 17th, I am enclosing herewith photostatic copies of three checks sent to Verna L. Leib by R. W. Leib and dated January 10, 1940, May 28, 1940 and May 29, 1940. The January 10th check shows a payment of $95.00, being $20.00 in excess of the $75.00 normal payment. The May 28th check shows the normal payment of $75.00 and on the following day a check for an additional $25.00 was made out and sent to Mrs. Leib. The other $25.00 spoken of in my former letter was telegraphed to Mrs. Leib in November, 1939, pursuant to her urgent request for a loan. None of these sums has been repaid. Several times Mr. Leib took up the matter of repayment with Mrs. Leib but at such times she responded with pleas that she was then unable to make repayments but would do so at a later date. Of course I am unable to send you any photostatic copy of the telegram as we have not the contact with the telegraph company upon the matter.

As stated in my former letter, Mr. Leib will be glad to send the $250.00 payments due less the $70.00 already lent or advanced upon your agreement to accept the same in full.

Very truly yours,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

JF:LW
enc.

83 Baker and Rosen
David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
MUrray Hill 2-1455

August 29th, 1944.

Jerome R. Finkle, Esq.,
Legislative Reference Bureau,
Springfield, Illinois.

Dear Mr. Finkle:

After deliberation with the former Mrs. Leib. Her position was that she would agree to accept the $180.00, although she still feels that Mr. Leib never loaned the sum of $70.00 to her.

In accordance with the closing paragraph in your letter of August 24th, I shall expect a check for the above sum as quickly as possible.

Very truly yours,
A. David Rosen.

ADR:dj

84 August 31, 1944

Baker and Rosen
Attorneys at Law
545 Fifth Avenue
New York 17, New York

Gentlemen:

Please find enclosed the personal check of Mr. R. W. Leib in the amount of $180.00 sent, pursuant to your letter of August 29th, as payment in full of alimony claim of Verna Crawford Henzel, the former Mrs. Leib.

Very truly yours,
Legislative Reference Bureau
Capitol Building
Springfield, Illinois

JF:LW
enc.

85 Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
MUrray Hill 2-1455

September eighth 1944

Jerome Finkle, Esq.
Legislative Reference Bureau
State Capitol Building
Springfield, Illinois

Dear Sir:

This is to acknowledge receipt of the check in the sum of $180, made by R. W. Leib, payable to the order of Verna Crawford Henzel.

This remittance satisfies in full the alimony claim of the former Mrs. Leib.

Yours very truly,

Baker & Rosen
A. David Rosen

ADR:dj

Indorsed: Filed Aug. 28, 1950. G. W. Schwaner, Clerk.

86 In the District Court of the United States.
* * (Caption—1134) * *

PROOF OF SERVICE.

A. M. Fitzgerald, being first duly sworn on oath deposes and says that he is the attorney for the above named defendant, R. Wells Leib, and that on Saturday, August 26, 1950, he mailed a complete copy of the within attached Suggestions in Objection to Motion by Plaintiff for New Trial, in the above entitled case, to Howard R. Blalock, Attorney, 1404 S. Eleventh Street, Springfield, Illinois, and to Joseph R. Carson and Jean S. Sheppard, Attorneys, 102 E. Main Street, Urbana, Illinois, properly addressed to them at their addresses, with the required and sufficient amount of

United States Postage, first class, placed upon the envelope containing said Suggestions, and deposited in the United States Mail at Springfield, Illinois.

A. M. Fitzgerald.

Subscribed and sworn to before me this 26th day of August, 1950.

Wm. F. Fuiten,
Notary Public.

(Notarial Seal)

Indorsed: Filed Aug. 28, 1950. G. W. Schwaner, Clerk.

87 And afterwards, to wit: on the 5th day of September, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

88 In the District Court of the United States.

* * (Caption—1134) * *

ORDER ON MOTION OF PLAINTIFF FOR A NEW TRIAL.

The Court having had under consideration motion of plaintiff herein for a new trial, and having fully considered the affidavit of A. David Rosen in support thereof, as well as the suggestions of defendant in opposition thereto, and the Court having further considered the conceded facts herein, Finds

(1) That there is no material controverted fact herein;

(2) That the affidavit of A. David Rosen in support of Plaintiff's motion for a new trial does not present any controverted question of fact but is merely a conclusion of affiant drawn from conceded facts;

(3) That the conclusions drawn in the Rosen affidavit are not warranted by the conceded facts.

It Is, Therefore, Ordered that the motion of Plaintiff for a new trial be and the same is hereby denied.

Dated this 5th day of September, A. D. 1950.

/s/ Chas. G. Briggle,
United States District Judge.

Indorsed: Filed Sept. 5, 1950. G. W. Schwaner, Clerk.

89 And afterwards, to wit: on the 3rd day of October, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Notice of Appeal, which said Notice of Appeal was and is in the words and figures, following, to wit:

90 APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

Verna Leib Sutton, *Plaintiff,*
vs.
R. Wells Leib, *Defendant.*
} Civil Action at Law No. 1134.

NOTICE OF APPEAL.

Notice is hereby given that Verna Leib Sutton, above named, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the Summary Judgment entered in this action on August 21, 1950.

Plaintiff further appeals from the order of the Court entered September 5, 1950, overruling and denying plaintiff's motion for a new trial.

Verna Leib Sutton, *Plaintiff.*
By Howard R. Blalock,
Joseph R. Carson,
Jean S. Sheppard,
Her Attorneys.

Howard R. Blalock, *Attorney*
1404 S. Eleventh St.
Springfield, Illinois

Joseph R. Carson and
Jean S. Sheppard, *Attorneys*
102 E. Main Street
Urbana, Illinois

Indorsed: Filed Oct. 3, 1950. G. W. Schwaner, Clerk.

91 And afterwards, to wit: on the 3rd day of October, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Tuesday, October 3, 1950

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

* * (Caption—1134) * *

It is ordered by the court that leave be and is hereby given the plaintiff in the above entitled case to file a bond for costs on appeal by October 16, 1950.

92 And afterwards, to wit: on the 16th day of October, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Bond for costs on appeal, which said Bond was and is in the words and figures, following, to wit:

93 Bond No. 35191.

Know All Men By These Presents, that we, Verna Leib Sutton, as Principal, and National Surety Corporation, as Surety, of the County of New York, State of New York, are held and firmly bound unto R. Wells Leib in the penal sum of Two Hundred Fifty and 00/100 ($250.00) Dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness Our Hands and Seals this 9th day of October, A. D. 1950.

The Condition of the Above Obligation Is Such, that whereas the said R. Wells Leib, did on the 21st day of August, 1950, in the United States District Court aforesaid, recover a Summary Judgment against the said Verna Leib Sutton for the costs of said action, and said Verna Leib Sutton has filed notice of and taken an appeal to the Circuit Court of Appeals of the United States for the Seventh Circuit.

Now, Therefore, if the said Verna Leib Sutton shall prosecute said appeal with effect and pay all costs rendered and to be rendered against her in case said appeal is dismissed or the Summary Judgment affirmed, or such costs as the said Appellate Court may award if the Summary Judgment is modified, then the above obligation to be void, otherwise to remain in full force and virtue.

Verna Leib Sutton, *Principal*
National Surety Corporation, *Surety*

By: R. Mac Lean, *Attorney-in-Fact*
And: Louise Chinat, *Attorney-in-Fact*

State of New York, }
County of New York. } ss:

I, Frances A. Massey, a Notary Public in and for the County of New York, State of New York, hereby certify that Verna Leib Sutton, personally known to me to be the same person whose name subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered said instrument as her free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 9th day of October, A. D. 1950.

Frances A. Massey,
Notary Public.

94 State of New York, } ss.
County of New York. }

On this 10th day of October 1950, before me personally appeared R. MacLean Attorney-in-Fact of National Surety Corporation with whom I am personally acquainted, and who, being by me duly sworn, says that he resides in the county of Baldwin, L. I., that he is Attorney-in-Fact of National Surety Corporation, the Corporation described in, and which executed the within instrument; that he knows the corporate seal of such Corporation, and the seal affixed to the within instrument is such corporate seal and that it was affixed by order of the Board of Directors of said Corporation, and that he signed said instrument as Attorney-in-Fact of said Corporation by like order. And said Attorney-in-Fact further stated that he is acquainted with Louise Chinat and knows him to be Attorney-in-Fact of said Corporation; that the signature of the said Louise Chinat subscribe to the said instrument is in the genuine handwriting of the said Louise Chinat and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909 constituting Chapter 28 of the Consolidated Laws of the State of New York, known as the Insurance Law, as amended, issued to National Surety Corporation his certificate that said Corporation is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law; and that such certificate has not been revoked.

Frank H. Cipolla,

Notary Public in the State of New York,
No. 24-5699200
Qualified in Kings County
Certificates filed with Kings Co. Registrar
New York County Clk. and Registrar
Queens County Clk. and Registrar
Bronx County Clk. and Registrar
Richmond County, Nassau County and
Westchester County
Term expires March 30, 1952.

Financial Statement—December 31, 1949

Assets

Cash in Banks		$ 3,325,711.91
Investments:		
Bonds of United States Government	$15,452,595.88	
All Other Bonds and Notes	8,093,949.07	
Preferred Stocks	3,819,520.00	
Common Stocks	10,098,495.00	37,464,559.95
Capital Stock of National Surety Marine Insurance Corporation, a wholly owned subsidiary		2,039,514.70
Premiums in course of collection, not over 90 days due		2,349,072.04
Accrued Interest		104,878.70
Reinsurance and other Accounts Receivable		190,282.82
Home Office Building		475,000.00
Total Admitted Assets		$45,949,020.12

Liabilities

Reserve for Losses and Loss Adjustment Expenses		$ 7,376,365.75
Reserve for Unearned Premiums		13,577,641.49
Reserve for Commissions, Expenses and Taxes		1,895,894.70
Capital	$ 7,500,000.00	
Surplus	15,599,118.18	
Surplus to Policyholders		23,099,118.18
Total		$45,949,020.12

Bonds carried at $1,182,798.03 are deposited as required by law.

Copy of Resolution.

At meeting of the Executive Committee of National Surety Corporation held in the City of New York, State of New York, on the 2nd day of February, 1950, the following resolution was unanimously adopted:

Resolved, that Edward M. Brown, Albert L. Carr, Albert E. Comstock, Jr., P. R. Cummings, Lawrence J. Dacunto, Edward J. Haring, Harry A. Kearney, A. H. Kraus, Katherine McFadden, William L. McGinty, R. MacLean, J. C. Murphy, Walter Pratz, J. G. Schleimer, Robert W. Schmitt, Walter W. Shannon, A. P. Valenti, M. A. Verdrose, Edward W. Warnke, Joseph Whitehead, hereby designated the First Group; and Louise Chinat, Daniel Giordano, Irene Jones, Mary McCarthy, A. C. Tirella, hereby designated the Second Group, be and each of them is hereby appointed an Attorney-in-Fact of this Corporation, and empowered to sign, seal and execute, acknowledge and deliver in its name, place and stead, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; but the Corporation shall be bound on any such instrument only when signed by two of the persons named in the First Group, or by one of those named in the First Group and one of those named in the Second Group, and when any such instrument is so signed and sealed with the seal of the Corporation, it shall bind the Corporation as fully and to the same extent as if it were signed by the President of the Corporation, sealed with its seal and attested by its Secretary, the Corporation hereby ratifying and confirming all the acts of said Attorneys-in-Fact done pursuant to the power and authority herein given.

I, J. R. Whitehead, Assistant Secretary of National Surety Corporation, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Corporation and do hereby certify that the same is true and correct transcript thereof and of the whole of the said original Resolution, that the same has not since been revoked and that the parties signing the attached instrument are still Attorneys-in-Fact of National Surety Corporation, and that the foregoing is a full, true and correct statement of the financial condition of said Corporation on the 31st day of December, 1949.

J. R. Whitehead,
Assistant Secretary.

(Seal)

Subscribed and sworn to before me this 10th day of October, 1950.

Frank H. Cipolla,
Notary Public in the State of New York,
No. 24-5699200
Qualified in Kings County
Certificates filed with Kings Co. Registrar
New York County Clk. and Registrar
Queens County Clk. and Registrar
Bronx County Clk. and Registrar
Richmond County, Nassau County and
Westchester County
Term expires March 30, 1952.

Indorsed: Filed Oct. 16, 1950, G. W. Schwaner, Clerk.

95 And afterwards, to wit: on the 27th day of October, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Designation of Contents of Record on Appeal, which said Designation together with proof of service thereof was and is in the words and figures, following, to wit:

96 IN THE UNITED STATES DISTRICT COURT.

(Caption—1134)

PROOF OF SERVICE.

Howard R. Blalock, being first duly sworn on oath deposes and says that on Friday, October 27, 1950, he mailed a complete copy of the within attached Designation of Contents of Record on Appeal, in the above entitled case to A. M. Fitzgerald, whose address is 504 East Monroe Street, Springfield, Illinois, properly addressed to him at that address, with the required and sufficient amount of United States Postage, first class, placed upon the envelope containing said Designation, and deposited in the United States mail at Springfield, Illinois.

Howard R. Blalock.

Subscribed and Sworn to before me this 27th day of October, A. D. 1950.

G. W. Schwaner,
(Seal) *Clerk, U. S. Dist. Court.*

97 THE UNITED STATES DISTRICT COURT.

(Caption—1134)

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

The Clerk of the United States District Court for the Southern District of Illinois, Southern Division, is hereby directed to make up a complete authenticated transcript of the record in the above entitled cause, said transcript to be made up so that it will contain the following documents and matters.

1. Process and return thereof.
2. Complaint.
3. Motion to Dismiss.
4. Reply to Motion to Dismiss with accompanying affidavits.
5. Brief of the Plaintiff on issues raised by Defendant's Motion to Dismiss, Affidavit accompanying it, and Counter-affidavit of Plaintiff.
6. Opinion of trial court.
7. Judgment of trial court.
8. Motion by Plaintiff for New Trial.
9. Suggestions in Objection to Motion by Plaintiff for New Trial.
10. Order on Motion of Plaintiff for a New Trial.
11. Notice of Appeal with date of filing and proof of service.
12. Bond for costs on Appeal.
13. Certificate of the clerk that such is the full and complete transcript of the record of the above entitled cause.

Verna Leib Sutton,
Plaintiff,
By Howard R. Blalock,
Joseph R. Carson,
Jean S. Sheppard,
Her Attorneys.

Howard R. Blalock, Attorney,
1404 S. Eleventh Street,
Springfield, Illinois,

Joseph R. Carson and
Jean S. Sheppard, Attorneys,
102 E. Main Street,
Urbana, Illinois.

Indorsed: Filed Oct. 27, 1950. G. W. Schwaner, Clerk.

98 And afterwards, to wit: on the 6th day of November, A. D. 1950, there was filed in the office of the Clerk of said court, a certain Appellee's Designation of Matters to be included in Record on Appeal, which said Designation together with Proof of Service thereof was and is in the words and figures, following, to wit:

99 THE UNITED STATES DISTRICT COURT.

(Caption—1134)

APPELLEE'S DESIGNATION OF MATTERS TO BE INCLUDED IN RECORD ON APPEAL.

The Clerk of the United States District Court, for the Southern District of Illinois, Southern Division, is hereby requested to include in the authenticated transcript of record in the above cause the following matters additional to the contents designated by the Appellant:—

1. The amendment of the Motion to Dismiss by the addition of prayer for summary judgment.

2. All those matters mentioned in Rule 75, Par. (g) of the Federal Court Rules of Civil Procedure for District Courts, and particularly the following:—

(a) The findings of fact and conclusions of law together with the direction of the entry of judgment thereon;

(b) All material pleadings without unnecessary duplication;

(c) The brief of the plaintiff on the issues herein was and is no part of the Clerk's record in this cause, but if such brief be included by the Clerk, there should also be included any and all briefs filed by the defendant pertaining to said issues.

R. Wells Leib,
By A. M. Fitzgerald,
His Attorney.

A. M. Fitzgerald,
Attorney for Defendant,
504 East Monroe Street,
Springfield, Illinois.

100 Proof of Service.

Walter T. Day, being first sworn, deposes and states that on Monday, November 6, A. D. 1950, he mailed a complete copy of the foregoing Appellee's Designation of Matters to be Included in Record on Appeal to Howard R. Blalock, Attorney, 1404 South 11th Street, Springfield, Illinois, and to Joseph R. Carson and Jean S. Sheppard, Attorneys, 102 E. Main Street, Urbana, Illinois, both respectively properly addressed, with sufficient postage attached thereto, for transmittal to said respective addresses, and deposited the same in the United States Mail at Springfield, Illinois, in the Post Office and that there is daily transmission of mails from said Post Office to the offices of said addressees.

Walter T. Day.

Subscribed and Sworn to before me this 6th day of November, A. D. 1950.

Wm. F. Fuiten,
(Notarial Seal) *Notary Public.*

Indorsed, Filed November 6, 1950. G. W. Schwaner, Clerk.

101 United States of America,
Southern District of Illinois, } ss.
Southern Division.

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and full transcript of the proceedings had of record and on file, made in accordance with Appellant's and Appellee's Designations of Contents of Record on Appeal, in the case of Verna Leib Sutton *vs.* R. Wells Leib, Civil Action No. 1134, as fully as the same appears from the original files and records in said cause now in my office remaining.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 9th day of November, A. D. 1950.

G. W. Schwaner,
(Seal) *Clerk.*

[fols. 79-80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] [Caption omitted]

[fols. 82-85] Appearances of Counsel—(Omitted in Printing)

[fol. 86] Argument and Submission—(Omitted in Printing)

[fol. 87] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

VERNA LEIB SUTTON, Plaintiff-Appellant,

vs.

R. WELLS LEIB, Defendant-Appellee

Appeal from the United States District Court for the Southern District of Illinois, Southern Division

OPINION—April 26, 1951

Before Major, Chief Judge, and Kerner and Finnegan, Circuit Judges

KERNER, Circuit Judge:

This appeal presents another aspect of the problem of migratory divorce. Plaintiff sued defendant, her first husband, for 40 alimony installments from August 1, 1944 to November 1, 1947, inclusive, alleged to be due under a divorce decree. Defendant denied the claim on the ground that his liability under the decree had been terminated by her remarriage on July 3, 1944. Her third marriage was to one Sherwood Sutton on November 21, 1947. The court rendered summary judgment in favor of defendant on his motion therefor, and the appeal is from that judgment.

The facts out of which the controversy arose are undisputed. Plaintiff obtained a decree of divorce from defendant in 1939 in an Illinois court. The decree provided for the payment of $125 "on or before the first day of each calendar month . . . for so long as the plaintiff shall

remain unmarried, or for so long as this decree remains in full force and effect * * *" After obtaining her divorce plaintiff moved to New York.

On July 3, 1944, plaintiff married Walter Henzel in Reno, [fol. 88] Nevada. Henzel had on that day obtained a decree of divorce in a Nevada court from Dorothy Henzel, a New York resident. She had been served only by publication and did not appear. Immediately following the divorce and remarriage plaintiff and Henzel returned to New York. On August 3, 1944, Dorothy Henzel instituted a separate maintenance proceeding against Walter in a New York court and this proceeding resulted in a decree in her favor, awarding separate maintenance and declaring the Nevada divorce null and void. Plaintiff had ceased living with Henzel immediately after service of summons in Dorothy Henzel's suit against him, and in January, 1945, she filed suit against him for annulment of their marriage. On June 6, 1947 the New York court entered an interlocutory decree which became final three months later, declaring the nullity of the marriage of plaintiff and Henzel on the ground that he had another wife living at the time of the marriage.

Defendant had made all the alimony payments due under the Illinois decree to and including that due on May 1, 1944. After the Nevada marriage some correspondence ensued between New York counsel for plaintiff and defendant's counsel relative to further payments. Defendant claimed a credit on account of some advances previously made to plaintiff. The matter was settled by the remittance of $180 in full on the payments due June 1 and July 1. In acknowledging the receipt of this amount by letter of September 8, 1944, plaintiff's counsel stated, "This remittance satisfies in full the alimony claim of the former Mrs. Leib." Plaintiff was remarried in November, 1947.

In rendering judgment for defendant the court held that it was unnecessary to determine which of the two conflicting judgments was entitled to the full faith and credit guaranteed by the Constitution of the United States, in view of the fact that the parties had entered into a contract settling the question of accrued alimony at a time when both treated the Nevada decree as valid and in full force and effect, and that no reason appeared why the settlement and

release then effected should not be held to constitute a binding obligation upon each.

We cannot agree with the reasoning of the court that acknowledgment of the remittance of the balance due on the June and July payments with the statement that it satisfied in full the alimony claim of the former Mrs. Leib operated of itself to bar any further claims on her part. [fol. 89] It covered an amount admittedly due on past installments—since the divorce decree required that payments be made on the first of each month, her marriage on July 3 would not entitle defendant to an apportionment of the amount for that month, and since the amount claimed by him to have been advanced to her was credited on the $250 due for the two months, there could not be said to be any compromise of a disputed claim. Acceptance of the amounts admittedly past due could not operate to extinguish any future liability arising under the decree. *San Fillipo* v. *San Fillipo*, 340 Ill. App. 353. We think this is true even though it appears of record that all but one of the series of nine letters between counsel relative to the June and July payments were written after plaintiff had knowledge of the pending separate maintenance action and had ceased living with Henzel.

There remains the question as to the effect of the Nevada remarriage on defendant's obligation to pay alimony to plaintiff "for so long as (she) shall remain unmarried * * *" The answer to this, we believe, turns on the validity of the marriage in Nevada, where it was performed, rather than in New York, where it was annulled. Section 121 of the Restatement, Conflict of Laws, relating to the law governing the validity of marriage, states the rule, "Except as stated in §§ 131 and 132 [which we deem inapplicable here], a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." See also *Peirce* v. *Peirce*, 379 Ill. 185. And of course the validity of the Nevada remarriage turns on the validity in Nevada of the antecedent Nevada divorce of Henzel from his New York wife.

We have searched the numerous cases decided by the Supreme Court of the United States on the subject of migratory divorce for a definitive holding as to the judicial

status of such divorce in the state that decreed it. It appears to be assumed that the decree is valid and binding in the state where it is rendered. Thus, Mr. Justice Frankfurter remarks in his concurring opinion, *Williams v. North Carolina I*, 317 U. S. 287, 307, "It is indisputable that Nevada's decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered." And Mr. Justice Murphy, concurring in *Williams II*, 325 U. S. 226, 239, states that "The State of Nevada has unquestioned authority, consistent [fol. 90] with due process, to grant divorces on whatever basis it sees fit, to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders." And Mr. Justice Rutledge, dissenting in the same case, at page 244, comments on the fact that the Nevada judgment was not voided by the decision. "It could not be, if the same test applies to sustain it as upholds the North Carolina convictions. It stands, with the marriages founded upon it, unimpeached." He and Mr. Justice Black, also dissenting, both call attention to the fact that the Court, in its decision, does not hold that the Nevada judgment is invalid in Nevada. Hence, in spite of the absence of a clear-cut statement in any of the main opinions of the Court as to the status of the Nevada decree in Nevada after a successful extraterritorial challenge of it, we think we may spell out authority for our assumption that it survives such challenge and remains in full force and effect within the confines of the state of Nevada until and unless it is set aside upon review in that state.

Assuming the validity of the divorce in Nevada, then the party or parties thereto resumed full marital capacity in that state. It follows that, so far as the state of Nevada is concerned, there was no inhibition against the remarriage of Walter Henzel in that state, and no reason appears for challenging his marriage there to plaintiff immediately after the decree of divorce was rendered. Under the terms of the Illinois decree of divorce of plaintiff and defendant, such marriage immediately terminated the obligation of the latter to continue the alimony payments required thereby. We think that obligation was not reinstated and

revived by the subsequent annulment of the Nevada marriage in New York.

Judgment affirmed.

[fols. 91-92] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Hon. J. Earl Major, Chief Judge; Hon. Otto Kerner, Circuit Judge; Hon. Philip J. Finnegan, Circuit Judge

10294

VERNA LEIB SUTTON, Plaintiff-Appellant,

vs.

R. WELLS LEIB, Defendant-Appellee

Appeal from the United States District Court for the Southern District of Illinois, Southern Division

JUDGMENT—April 26, 1951

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division; and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

[fols. 93-114] Petition for Rehearing covering 15 pages filed May 8, 1951, omitted from this print. It was denied, and nothing more by order of May 22, 1951.

[fols. 115-130] Answer of Appellee to Petition for Rehearing of Appellant (omitted in printing).

[fol. 131] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—May 22, 1951

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fols. 132-134] Motion for stay and order staying mandate (omitted in printing).

[fols. 135-136] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 137] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 143

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 143

VERNA LEIB SUTTON,
Petitioner,

vs.

R. WELLS LEIB,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

JOHN ALAN APPLEMAN,
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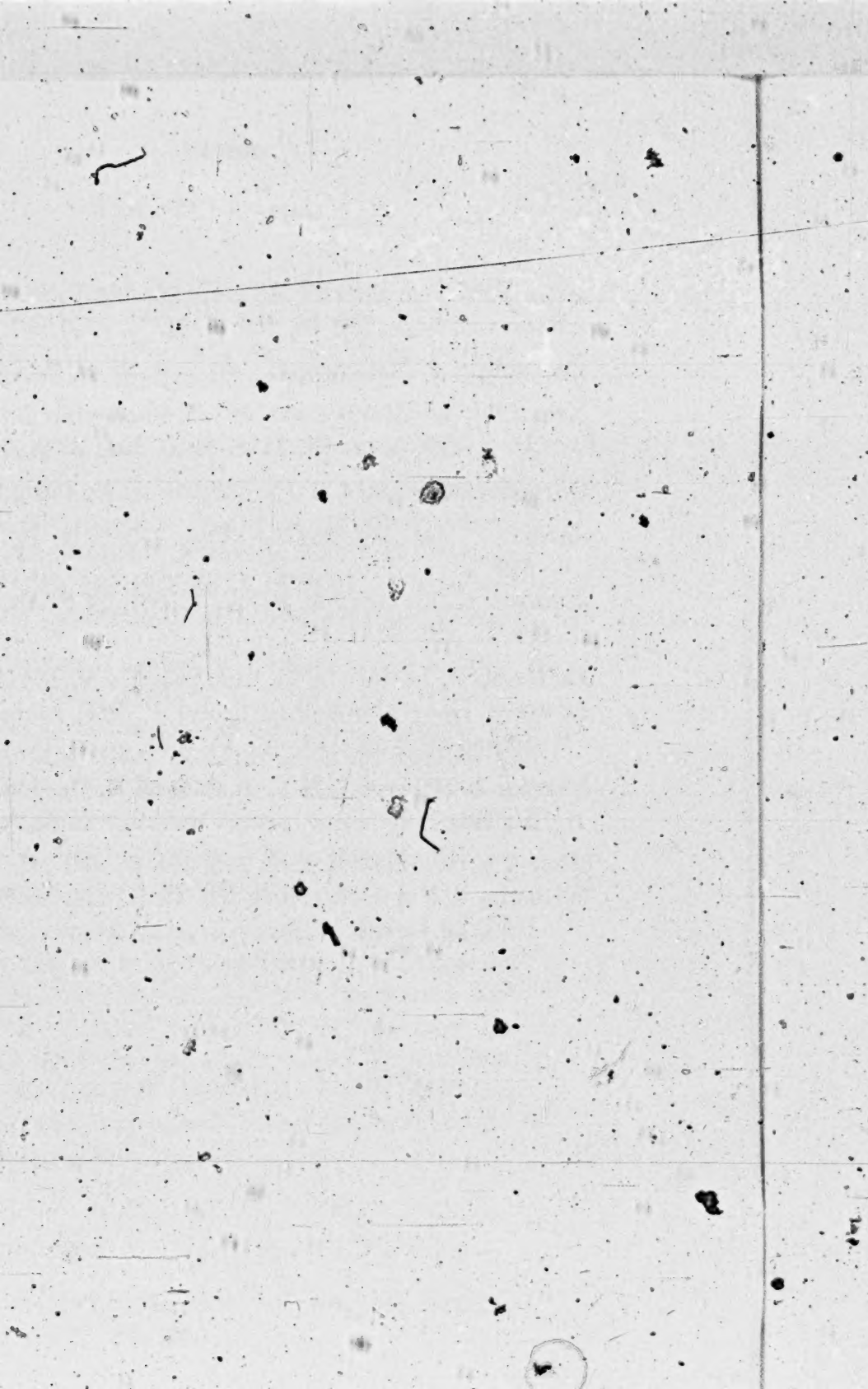

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

VERNA LEIB SUTTON,

Petitioner,

vs.

R. WELLS LEIB,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit entered upon April 26, 1951, and confirmed upon rehearing May 22, 1951, affirming the decree of the District Court of the United States for the

Southern District of Illinois, Southern Division, rendered upon September 5, 1950.

Opinion Below.

The opinion of the court below entered upon April 26, 1951, and adhered to upon rehearing, is printed in an appendix to this petition, for the convenience of this Court.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 1254 (1) of Title 28 of the United States Code.

The opinion of the United States Court of Appeals for the Seventh Circuit was filed, as stated, upon April 26, 1951; petition for rehearing was duly filed upon May 8; and an order denying the petition for rehearing was entered upon May 22. Application for stay of mandate pending application in this Court for writ of certiorari was made May 28, 1951, and an order staying the mandate for thirty days pending the application for writ of certiorari in this Court was entered May 29, 1951.

Questions Presented.

The questions presented here for determination are important, but may be stated very briefly. They are as follows:

1. A Nevada divorce decree is rendered in favor of a New York resident against his wife, who is neither served with process in Nevada nor appears and contests those proceedings. New York thereafter, in a suit for separate maintenance between such parties where both appear, holds the Nevada divorce decree invalid. *Quaere*, in a

federal court in Illinois, which decree—i. e., the divorce decree in Nevada or the New York decree holding the Nevada decree invalid—is entitled to full faith and credit?

2. The petitioner, the same day as the rendition of the Nevada divorce decree and prior to the rendition of the New York decree, goes through a form of marriage ceremony in Nevada with the husband who procured the Nevada divorce and both immediately return to New York. This was the State of domicile of both such parties both prior to and subsequent to the re-marriage. In a contest between her and such person, New York also enters another decree holding such marriage ceremony bigamous and void, in view of the invalidity of the Nevada divorce. *Quaere*, does the petitioner's void marriage to such New York resident deprive her of alimony from respondent under an earlier Illinois decree requiring respondent to pay alimony "for so long as the plaintiff shall remain unmarried"?

In answering these questions we assign as error the action of the United States Court of Appeals in giving full faith and credit to the Nevada divorce decree and in refusing full faith and credit to the New York decrees, and in holding as a result thereof that the petitioner's attempted remarriage was valid and deprived her of her right to alimony under the Illinois decree.

Summary Statement.

To avoid controversy, we adopt the following statement from the opinion of the United States Court of Appeals, Seventh Circuit which sets up the controlling facts concisely:

> "The facts out of which the controversy arose are undisputed. Plaintiff obtained a decree of divorce from defendant in 1939 in an Illinois court.

> The decree provided for the payment of $125 'on or before the first day of each calendar month * * * for so long as the plaintiff shall remain unmarried, or for so long as this decree remains in full force and effect * * *'. After obtaining her divorce plaintiff moved to New York.
>
> "On July 3, 1944, plaintiff married Walter Henzel in Reno, Nevada. Henzel had on that day obtained a decree of divorce in a Nevada court from Dorothy Henzel, a New York resident. She had been served only by publication and did not appear. Immediately following the divorce and remarriage plaintiff and Henzel returned to New York. On August 3, 1944, Dorothy Henzel instituted a separate maintenance proceeding against Walter in a New York court and this proceeding resulted in a decree in her favor, awarding separate maintenance and declaring the Nevada divorce null and void. Plaintiff had ceased living which Henzel immediately after service of summons in Dorothy Henzel's suit against him, and in January 1945 she filed suit against him for annulment of their marriage. On June 6, 1947 the New York court entered an interlocutory decree which became final three months later, declaring the nullity of the marriage of plaintiff and Henzel on the ground that he had another wife living at the time of the marriage. * * * Plaintiff was remarried in November 1947."

The amount of alimony accruing for the period in question amounts to exactly $5,000.

The reason for the opinion of the Court of Appeals appears clearly in its opinion. It stated, first, that it was unable to find any clear-cut opinion from this Court as to the status occupied by persons standing in the position of the Henzels in the state rendering the divorce

decree, which decree was later held invalid by the state of the parties' domicile. The court then states, "It appears to be assumed that the decree is valid and binding in the state where it is rendered." From this, the court below reasoned that while the Nevada divorce might be regarded as invalid in New York, nevertheless Henzel was divorced so far as Nevada was concerned; and that, by reason thereof, the petitioner's marriage to Henzel was valid in the State of Nevada, and that Illinois would have to recognize that status as controlling under the Illinois decree for alimony, despite the New York adjudication that such marriage ceremony was bigamous and void.

Reasons for Granting the Petition.

This unique case presents a question of great public importance, involving marital status and the full faith and credit clause where three states, rather than two alone, are involved. Matters of family status, marriage, and divorce are of the greatest importance. In addition, it appears that the United States Court of Appeals makes a holding which is squarely contrary to all of the recent decisions of this Court, and any ambiguity existing should be settled with finality.

It seemed to be the opinion of the United States Court of Appeals, as evidenced by its decision, that the decisions of this Court in *Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, and subsequent decisions hold that the decree of the state granting the divorce becomes conclusive, at least within its own boundaries. This is apparently a misconstruction of the language of these decisions. What this Court has held, in those cases, is that no person is entitled to two separate days in court, in order to relitigate the same issues. Thus, if a defendant to a divorce action is served personally in the state rendering the decree, or appears and contests the issues

in that case, the divorce decree is conclusive as to all matters, including jurisdictional questions. This is a vastly different situation than where the defendant to such a proceeding is neither served with process in that state nor appears and submits to the jurisdiction of that court. In such an instance, where the state of the domicile, which was New York in this case, is presented with all of these issues for determination in a suit between the parties wherein both appear and contest the matter—then its decision is controlling as to all issues, including the question of validity of the divorce decree. If the decree of New York was then valid and binding, it is entitled to full faith and credit everywhere, even in the state which had rendered the divorce decree. To hold otherwise would create an abnormal situation whereby the petitioner would have two husbands and Mr. Henzel, two wives, outside the State of New York. The refusal of the United States Court of Appeals to follow this rule and reasoning amounts to a denial of the full faith and credit clause.

Similarly, if Walter Henzel was not validly divorced from his wife, Illinois has held that a marriage ceremony entered into by such an undivorced individual is bigamous and void. Under the Illinois law, such attempted marriage would be nugatory for all purposes. The respondent would not be relieved of liability for alimony accruing during the period in question.

Since the questions are short and simple, we are incorporating our brief in support of this petition as a part of the petition, following immediately hereafter, and have attached as an appendix the opinion of the United States Court of Appeals for the Seventh Circuit, for the convenience of this Court. We believe this matter is of the greatest importance, and that it can be resolved expeditiously by this Court to remove any confusion existing in this field and to correct the error of the court below.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit should be granted.

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Attorney for Petitioner.

JOHN ALAN APPLETON,
EDWARD D. BOLTON,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

The petitioner herewith adopts the Statement of Facts set forth in the opinion of the United States Court of Appeals for the Seventh Circuit and hereinbefore quoted as the controlling facts in this case. There is no substantial dispute as to the occurrences, but only as to the conclusions of law resulting therefrom.

Assignments of Error.

1. The United States Court of Appeals for the Seventh Circuit erred in holding that the Nevada decree of divorce was entitled to full faith and credit, and in denying full faith and credit to the New York decrees.

2. The United States Court of Appeals for the Seventh Circuit erred in holding that the marriage ceremony in Nevada deprived the petitioner of her right to alimony from respondent under the Illinois decree of divorce.

Propositions of Law.

I.

A decree of divorce rendered by a state other than the domicile of the parties is entitled to full faith and credit only where the defendant is served personally in such state or appears and contests those proceedings.

Williams v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
Esenwein v. *Commonwealth of Pennsylvania*, 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608;
Sherrer v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429;
Johnson v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

II.

Even Nevada refuses to enforce a divorce decree rendered by one of its courts where a spouse goes to Nevada solely to obtain a divorce and returns to the state of his domicile immediately upon securing the divorce.

Aspinwall v. *Aspinwall*, 40 Nev. 55, 184 P. 810;
Walker v. *Walker*, 45 Nev. 105, 198 P. 433;
Lewis v. *Lewis*, 50 Nev. 419, 264 P. 981, rehearing denied 50 Nev. 419, 267 P. 399;
Latterner v. *Latterner*, 51 Nev. 285, 274 P. 194.

III.

All factual issues of domicile, good faith, and other matters bearing upon jurisdiction must be considered as foreclosed by the New York decrees, since all parties to the divorce and to the remarriage were domiciled in that state, were personally served with process, and contested such issues in those proceedings.

Williams v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
Sherrer v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429.

IV.

Since Henzel was not validly divorced from his former wife, the attempted marriage of petitioner and Henzel was bigamous and void ab initio and would not destroy the rights of the petitioner under Illinois law, which controls the status of both petitioner and the respondent under the earlier Illinois decree.

Jardine v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645;
Atkins v. *Atkins*, 393 Ill. 202, 65 N. E. (2d) 801;
Gordon v. *Gordon*, 141 Ill. 160, 30 N. E. 446;
Cartwright v. *McGown*, 121 Ill. 388, 12 N. E. 737.

ARGUMENT.

I.

A decree of divorce rendered by a state other than the domicile of the parties is entitled to full faith and credit only where the defendant is served personally in such state or appears and contests those proceedings.

The Court of Appeals apparently adopted the view that the decree of divorce may be valid in Nevada but invalid in New York, which threw the court into utter confusion as to how to apply the full faith and credit clause. It finally concluded by giving full faith and credit to the Nevada decree and denying such full faith and credit to the New York decrees, which latter state actually had jurisdiction of the parties.

It is our feeling that the recent decisions of this Court have wholly removed any ambiguity. The application of

full faith and credit depends upon whether or not the defendant in the divorce action had his or her day in court to contest the various issues, including jurisdiction in the divorcing state to deal with the parties and subject matter. If such defendant was personally served in that state or appeared and contested the issues, this Court has consistently held that the determination by that state is final, and the question cannot be relitigated ad infinitum. If, however, that defendant was neither served with process in that state nor had an opportunity to contest the issues upon the merits or pertaining to jurisdiction, a different result must follow. In such an instance, when the courts of the domicile subsequently adjudicate this question between the parties, in a proceeding where both parties appear and present their arguments, its determination that such divorce was invalid is final. Such decree would then be entitled to full faith and credit in all states, including the state which had granted the divorce.

This rule was clearly laid down by Mr. Justice Frankfurter in the second *Williams case*, 325 U. S. 226, 65 S. Ct. 1092 at 1095, 89 L. Ed. 1577, when he stated:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated between the parties."

It seemed to us that the language of this Court was very clear, but fundamentally the same question again arose in *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429. Mr. Chief Justice Vinson expanded these holdings, speaking as follows in 68 S. Ct. 1087 at 1089, 1093:

"That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that state is not disputed. * * * Here, unlike the situation presented in *Williams* v. *North Carolina*, 1945, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366, the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated. * * * It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by sister States of findings of jurisdictional facts made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and *in which the defendant has participated.*" (Italics added.)

In its last declaration in *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411, this Court used similar language:

"It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree."

Now the effect of those decisions seems clear. If Nevada had required Dorothy Henzel to be personally served, or if she had appeared and contested the issues in that state, both New York and Illinois would be re-

quired to give full faith and credit to its decree. The same result does not follow as to an ex parte proceeding. To the contrary, when New York had jurisdiction over the parties who appeared and litigated the matter of the validity of the divorce decree, the decision of New York was absolutely binding upon them and was entitled to full faith and credit in every state in the nation—including Nevada. Marital rights and obligations must be settled with some finality. A man cannot be divorced in one state and married in another, any more than a nation can exist half slave and half free.

Forgetting the divorce situation entirely, assume that John Jones secures a judgment by confession against James Brown in Cincinnati, Ohio. At that time James Brown lives in Chicago and John Jones takes his Ohio judgment and sues Brown in Illinois upon it. Brown defends the case and affirmatively proves that the note was secured by fraud. The Illinois court not only denies relief to the plaintiff but enters a declaration that the note is void and invalid, and that the judgment procured in Ohio is unenforceable. It would be a strange anomaly if John Jones, later finding Brown in Virginia, could institute a new suit in Virginia upon the same obligation and require Brown again to establish his non-liability. Nor could Jones claim that Virginia should recognize the Ohio judgment rather than the Illinois holding.

In this case, we do not feel that Dorothy Henzel was required, after winning her case in New York, to go to Nevada to adjudicate again the same matter. Nor do we believe it was incumbent upon the petitioner here, after New York had held the Henzel divorce decree invalid and the petitioner's remarriage to be void ab initio, to go to Nevada to secure another decree to the same effect—particularly when she could not even have secured personal service upon Walter Henzel if she had done so. Nevada, as a sister state in our union, was and is bound

to give full faith and credit to the actions of New York, which had determined these questions after full appearance and contest by all parties in interest.

II.

Even Nevada refuses to enforce a divorce decree rendered by one of its courts where a spouse goes to Nevada solely to obtain a divorce and returns to the state of his domicile immediately upon securing the divorce.

Actually, it seems immaterial as to the holdings in the State of Nevada upon like questions. However, Nevada has repeatedly held that a divorce decree rendered in that state is nugatory, where a domiciliary of another state goes there merely for the purpose of procuring a divorce and departs immediately thereafter. In *Aspinwall* v. *Aspinwall,* 40 Nev. 55, 184 P. 810, Nevada pointed out that the question of domicile was vital in determining jurisdiction. In *Walker* v. *Walker,* 45 Nev. 105, 198 P. 433, the court declared:

> "Residence in this state for the statutory period * * * is not sufficient to give jurisdiction, but a bona fide residence with the intention of remaining must appear."

In the other cases cited under our "Propositions of Law" it is pointed out that the statutory requirements in that state were adopted to prevent the abuses of its laws which had led to great criticism, and that a bona fide domicile was absolutely essential in order for its court to obtain jurisdiction to grant a divorce decree.

Under these circumstances, it is apparent that Nevada would have reached a result similar to that of the State of New York under the facts of this case, and there is no

reason to believe that Nevada would deny full faith and credit to the New York holdings. Under the provisions of our Constitution, Nevada is bound by the result in New York.

III.

All factual issues of domicile, good faith, and other matters bearing upon jurisdiction must be considered as foreclosed by the New York decrees, since all parties to the divorce and to the remarriage were domiciled in that state, were personally served with process, and contested such issues in those proceedings.

Without reiterating the matters discussed under part I, supra, we believe that the language of those cases is conclusive upon this issue. This Court has repeatedly pointed out that, where jurisdictional questions have been litigated once between the parties, they cannot be relitigated in another forum. In this case, those issues were fully litigated in New York, and all the parties involved in those controversies had an opportunity to raise any question desired, either in support of the Nevada acts or in opposition thereto. The New York courts necessarily had to determine the questions of domicile, bona fides of Walter Henzel in going to Nevada, and other questions involved in the matter of jurisdiction. Thereafter, the decrees of New York were conclusive upon all persons, and those decrees must be given full faith and credit.

IV.

Since Henzel was not validly divorced from his former wife, the attempted marriage of petitioner and Henzel was bigamous and void ab initio and would not destroy the rights of the petitioner under Illinois law, which controls the status of both petitioner and the respondent under the earlier Illinois decree.

It is evident that Illinois is required to give full faith and credit to the decrees of New York, and the District Court and the Court of Appeals for Illinois are bound to the same degree. It should be pointed out, in addition, that Illinois has specifically passed upon similar questions before, and has refused to allow such a remarriage to upset the status of its domiciliaries.

In *Jardine* v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645, an almost identical situation was presented. In 1931, Jardine left New York State and went to Reno where he established a six weeks' residence and secured a divorce from his New York wife. He left Nevada the same day and married the plaintiff in Illinois, and they both then went to New York. The plaintiff in 1935 brought an action in Illinois to have her marriage to Jardine declared a nullity upon the ground that it was bigamous and void, contending that the Reno divorce was invalid. The court declared:

> "Since the Nevada court was without jurisdiction and therefore without power or authority to enter its divorce decree, such decree was not legally effective to sever the marital relation existing between the defendant and his then wife. That divorce being void, defendant was not free to remarry and his marriage afterward to plaintiff pursuant to it

was also void. The invalidity of the marriage of the parties to this proceeding was an established fact since its very inception. * * *"

Similarly, in *Cartwright* v. *McGown*, 121 Ill. 388, 12 N. E. 737, it was declared at page 395:

"The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to void the same."

In view of these declarations it is apparent that Illinois would not hold the respondent to have been relieved of his marital obligations by reason of the entry of petitioner into a marriage ceremony which was void ab initio. Such a ceremony would not discharge the respondent under the terms of the Illinois decree requiring him to pay alimony to the petitioner "for so long as the plaintiff shall remain unmarried." No contention has been made by the respondent that he should be discharged by reason of any misconduct of the petitioner, and it becomes unnecessary to consider that question.

Conclusion.

It is apparent from the foregoing facts that the United States Court of Appeals for the Seventh Circuit misconstrued the language of this Court in its several decisions upon this subject. It seems quite clear that the divorce decree rendered by the State of Nevada was void and is not entitled to full faith and credit. However, the decrees of New York, which had jurisdiction of the parties, all of whom appeared and contested the various questions in the New York courts, are binding and entitled to recognition in all states. That being true, the petitioner was never

validly married to Walter Henzel, and the liability of the respondent for alimony continued until November, 1947.

Under those circumstances, it is apparent that the petitioner is entitled to recover the $5,000 alimony for which action was brought, together with court costs incurred by her in pursuing her litigation in the District Court and upon appeal. It is respectfully prayed that the judgments of the District Court and of the Court of Appeals for the Seventh Circuit be reversed with directions to enter judgment in favor of the petitioner in the amount of $5,000 and costs, together with interest from the time such amounts became due and payable or in the alternative that a writ of certiorari be issued to the United States Court of Appeals, for the Seventh Circuit, to the end that this case may be reviewed and determined by this Court, that the judgment of the United States Court of Appeals, for the Seventh Circuit be reversed and that petitioner be granted such other and further relief as may seem fitting and proper.

Respectfully submitted,

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Attorney for Petitioner.

JOHN ALAN APLEMAN,
EDWARD D. BOLTON,
Of Counsel.

APPENDIX.

Opinion of United States Circuit Court of Appeals for the Seventh Circuit, Rendered April 26, 1951.

Before Major, *Chief Judge*, and Kerner and Finnegan, *Circuit Judges*.

KERNER, *Circuit Judge*. This appeal presents another aspect of the problem of migratory divorce. Plaintiff sued defendant, her first husband, for 40 alimony installments from August 1, 1944 to November 1, 1947, inclusive, alleged to be due under a divorce decree. Defendant denied the claim on the ground that his liability under the decree had been terminated by her remarriage on July 3, 1944. Her third marriage was to one Sherwood Sutton on November 21, 1947. The court rendered summary judgment in favor of defendant on his motion therefor, and the appeal is from the judgment.

The facts out of which the controversy arose are undisputed. Plaintiff obtained a decree of divorce from defendant in 1939 in an Illinois court. The decree provided for the payment of $125 "on or before the first day of each calendar month * * * for so long as the plaintiff shall remain unmarried, or for so long as this decree remains in full force and effect * * * *". After obtaining her divorce plaintiff moved to New York.

On July 3, 1944, plaintiff married Walter Henzel in Reno, Nevada. Henzel had on that day obtained a decree of divorce in a Nevada court from Dorothy Henzel, a New York resident. She had been served only by publication and did not appear. Immediately following the divorce and remarriage plaintiff and Henzel returned to New York. On August 3, 1944, Dorothy Henzel instituted a separate maintenance proceeding against Walter in a New York court and this proceeding resulted in a decree

in her favor, awarding separate maintenance and declaring the Nevada divorce null and void. Plaintiff had ceased living with Henzel immediately after service of summons in Dorothy Henzel's suit against him, and in January 1945 she filed suit against him for annulment of their marriage. On June 6, 1947 the New York court entered an interlocutory decree which became final three months later, declaring the nullity of the marriage of plaintiff and Henzel on the ground that he had another wife living at the time of the marriage.

Defendant had made all the alimony payments due under the Illinois decree to and including that due on May 1, 1944. After the Nevada marriage some correspondence ensued between New York counsel for plaintiff and defendant's counsel relative to further payments. Defendant claimed a credit on account of some advances previously made to plaintiff. The matter was settled by the remittance of $180 in full on the payments due June 1 and July 1. In acknowledging the receipt of this amount by letter of September 8, 1944, plaintiff's counsel stated, "This remittance satisfies in full the alimony claim of the former Mrs. Leib." Plaintiff was remarried in November 1947.

In rendering judgment for defendant the court held that it was unnecessary to determine which of the two conflicting judgments was entitled to the full faith and credit guaranteed by the Constitution of the United States, in view of the fact that the parties had entered into a contract settling the question of accrued alimony at a time when both treated the Nevada decree as valid and in full force and effect, and that no reason appeared why the settlement and release then effected should not be held to constitute a binding obligation upon each.

We cannot agree with the reasoning of the court that acknowledgment of the remittance of the balance due on the June and July payments with the statement that it

satisfied in full the alimony claim of the former Mrs. Leib operated of itself to bar any further claims on her part. It covered an amount admittedly due on past installments—since the divorce decree required that payments be made on the first of each month, her marriage on July 3 would not entitle defendant to an apportionment of the amount for that month, and since the amount claimed by him to have been advanced to her was credited on the $250 due for the two months, there could not be said to be any compromise of a disputed claim. Acceptance of the amounts admittedly past due could not operate to extinguish any future liability arising under the decree. *San Fillipo* v. *San Fillipo*, 340 Ill. App. 353. We think this is true even though it appears of record that all but one of the series of nine letters between counsel relative to the June and July payments were written after plaintiff had knowledge of the pending separate maintenance action and had ceased living with Henzel.

There remains the question as to the effect of the Nevada remarriage on defendant's obligation to pay alimony to plaintiff "for so long as (she) shall remain unmarried * * *". The answer to this, we believe, turns on the validity of the marriage in Nevada, where it was performed, rather than in New York, where it was annulled. Section 121 of the Restatement, Conflict of Laws, relating to the law governing the validity of marriage, states the rule, "Except as stated in §§131 and 132 [which we deem inapplicable here], a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." See also *Peirce* v. *Peirce*, 379 Ill. 185. And of course the validity of the Nevada remarriage turns on the validity in Nevada of the antecedent Nevada divorce of Henzel from his New York wife.

We have searched the numerous cases decided by the Supreme Court of the United States on the subject of

migratory divorce for a definitive holding as to the judicial status of such divorce in the state that decreed it. It appears to be assumed that the decree is valid and binding in the state where it is rendered. Thus Mr. Justice Frankfurter remarks in his concurring opinion, *Williams* v. *North Carolina I*, 317 U. S. 287, 307, "It is indisputable that Nevada's decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered." And Mr. Justice Murphy, concurring in *Williams II*, 325 U. S. 226, 239, states that "The State of Nevada has unquestioned authority, consistent with due process, to grant divorces on whatever basis it sees fit, to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders." And Mr. Justice Rutledge, dissenting in the same case, at page 244, comments on the fact that the Nevada judgment was not voided by the decision. "It could not be, if the same test applies to sustain it as upholds the North Carolina convictions. It stands, with the marriages founded upon it, unimpeached." He and Mr. Justice Black, also dissenting, both call attention to the fact that the Court, in its decision, does not hold that the Nevada judgment is invalid in Nevada. Hence, in spite of the absence of a clear-cut statement in any of the main opinions of the Court as to the status of the Nevada decree in Nevada after a successful extraterritorial challenge of it, we think we may spell out authority for our assumption that it survives such challenge and remains in full force and effect within the confines of the state of Nevada until and unless it is set aside upon review in that state.

Assuming the validity of the divorce in Nevada, then the party or parties thereto resumed full marital capacity in that state. It follows that, so far as the state of Nevada is concerned, there was no inhibition against the remar-

riage of Walter Henzel in that state, and no reason appears for challenging his marriage there to plaintiff immediately after the decree of divorce was rendered. Under the terms of the Illinois decree of divorce of plaintiff and defendant, such marriage immediately terminated the obligation of the latter to continue the alimony payments required thereby. We think that obligation was not reinstated and revived by the subsequent annulment of the Nevada marriage in New York.

Judgment affirmed.

IN THE

Supreme Court of the United States

October Term, 1951.

No. 143.

VERNA LEIB SUTTON,

Petitioner,

vs.

R. WELLS LEIB,

Respondent.

REBUTTAL BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

VERNA LEIB SUTTON, *Petitioner,* vs. R. WELLS LEIB, *Respondent.*	No. 143

REBUTTAL BRIEF OF PETITIONER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent has briefed two points of interest. They are as follows:

1. That petitioner voluntarily abandoned her right to alimony.

2. That a remarriage may be valid in Nevada, even though one spouse, supposedly divorced in that state, is not validly divorced and would, accordingly, be a bigamist.

As to the first of these questions it would be improper to join issue upon it at this time. The rules of this Court require that no issue be injected for the first time in this Court. It was never contended by the respondent, either in the District Court or in the Court of Appeals, that there was any abandonment by petitioner. Respondent there

claimed that there was a valid *release* by petitioner of the alimony obligation, upon which issue the Court of Appeals found against respondent. That court pointed out that there was a complete lack of consideration, since respondent paid nothing for any alleged release, except previously accrued alimony as to which he was in arrears. No cross error has been assigned by the respondent in this Court as to such holding.

However, we do want to correct the misleading statements of fact upon page 10 of respondent's brief, not supported by the record, which might lead this Court to believe the petitioner to be a loose woman. Respondent states: "A mature woman (21 years of age) was first married to respondent (who was 30 years of age) in 1924; twenty years thereafter, in 1944, she married Henzel, leaving her home in New York to go to Nevada for this purpose and knowing that he was in Nevada for the purpose of securing a divorce from his wife." (Matter in parenthesis interpolated.)

The facts in the opinion show that the petitioner and respondent were divorced in Illinois in 1939 (Tr., pp. 87; 5-6). It was subsequent to this time that the petitioner moved to New York, and she had been divorced for some five years when she entered into a ceremony with Henzel upon July 3, 1944. She ceased living with Henzel immediately when a question was raised concerning the validity of the Reno divorce, thirty days later. These facts all appear in the opinion of the Court of Appeals (see Petition, p. 19).

Upon page 8 the reply brief also contains this misstatement: "There was no decree of any court that her marriage to Henzel was void." This is untrue. There was an express decree of the New York court declaring such marriage to be null and void ab initio, as the result of a hearing in which both parties to such marriage were present, appeared, and contested the matter (Tr., pp. 27-29; 33-36).

As to petitioner being charged with knowledge of the efficacy of ceremonies, we need only point out that either counsel for the petitioner or counsel for the respondent is quite confused on the law governing this situation, and we should scarcely expect a layman to have more knowledge than such attorneys.

Since the question of abandonment has never before been raised by respondent, we shall not trouble this Court with a reply that analyzes the facts of the greatly different cases cited by respondent thereon, nor with questions dealing with the effect of mistake as to mixed questions of law and fact, the difference between a remarriage void as bigamous and one which is in violation of a directory statutory provision forbidding remarriage within one year, the fact that a waiver must be of a "known" right, and other matters. It is, of course, absurd to talk about a woman's reliance for support upon a second husband if she was never validly married to such second person, and he accordingly owes no legal duty to her. The Court of Appeals has pointed out that there was no valid consideration for a "release," as heretofore contended by respondent, and the respondent has not attacked the question of that court or the controlling effect of *San Fillippo* v. *San Fillippo,* 340 Ill. App. 353, cited by the Court of Appeals.

As to the second issue, however, the respondent, we believe, has failed to recognize the point made by petitioner's brief. It is this, simply. Neither New York nor Nevada can establish a result which will control in other states, unless both parties to the decree which is entered in such state either appeared personally in that forum or were served personally with process within the borders of that state. Such a decree is vulnerable to attack by any forum having the parties and subject matter properly before it. And where a decree is entered by such latter forum, thus invested with jurisdiction by having the parties before it and having power to adjudicate their status, *all* states must give full faith and credit to that decree. The mere

fact that a different state earlier entered a vulnerable decree will not excuse the refusal of such earlier state to extend full faith and credit to the subsequent decree of a competent court.

Either the petitioner is correct in believing that this is now the law of the land, or the recent decisions of this Court should be clarified which seemingly announce this result. There is no vacillation which we can find in this Court's recent adjudications. The respondent stands squarely upon the position that the Nevada decree is binding in the State of Nevada; the petitioner takes a directly opposite view, basing this belief upon the cases cited in the original brief, and which the respondent has not bothered to analyze or to distinguish. There is no middle ground of compromise. Either the respondent is right or the petitioner is right. The question is one of such controlling importance that it would be a mistake for this Court to fail to decide this question directly, upon the circumstances here presented. We ask only a full consideration by this Court and a result which will help to maintain consistency in the jurisprudence bearing upon full faith and credit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 143.

VERNA LEIB SUTTON,
Plaintiff-Appellant,

vs.

R. WELLS LEIB,
Defendant-Appellee.

Statement, Brief and Argument for Appellant.

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IN THE

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OCTOBER TERM, 1951.

VERNA LEIB SUTTON, *Plaintiff-Appellant,* vs. R. WELLS LEIB, *Defendant-Appellee.*	No. 143.

Statement, Brief and Argument for Appellant.

(Figures in Parentheses Refer to Page Numbers of Transcript of Record.)

Report of Opinion Below.

The opinion of the District Court seems not to have been published.[1] The opinion of the Court of Appeals for the Seventh Circuit rendered April 26, 1951, rehearing denied May 22, 1951, appears in 188 F. (2d) 766.[2]

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1. Opinion of District Court (printed, T. R., pp. 44-48).
2. Opinion, Court of Appeals, Seventh Circuit (printed, T. R., pp. 87-90).

Jurisdictional Grounds.

Jurisdiction of the federal court was predicated upon diversity of citizenship of the parties and an amount in controversy in excess of $3000. The judgment of the District Court was affirmed upon appeal to the Court of Appeals for the Seventh Circuit. A stay of mandate was granted, and jurisdiction of this court invoked by a petition of writ of certiorari which was granted October 15, 1951, pursuant to Ch. 646, 62 Stat. 928, June 25, 1948, 28 U. S. C. A. §1254.

Statement of Facts.

In view of the concise and accurate statement of facts contained in the opinion of the Court of Appeals, we adopt that statement hereafter, to avoid controversy.

> "Plaintiff sued defendant, her first husband, for 40 alimony installments from August 1, 1944 to November 1, 1947, inclusive, alleged to be due under a divorce decree. Defendant denied the claim on the ground that his liability under the decree had been terminated by her remarriage on July 3, 1944. Her third marriage was to one Sherwood Sutton on November 21, 1947. The court rendered summary judgment in favor of defendant on his motion therefor, and the appeal is from the judgment.
>
> "The facts out of which the controversy arose are undisputed. Plaintiff obtained a decree of divorce from the defendant in 1939 in an Illinois court. The decree provided for the payment of $125 'on or before the first day of each calendar month * * * for so long as the plaintiff shall remain unmarried, or for so long as this decree remains in

full force and effect * * *.' After obtaining her divorce plaintiff moved to New York.

"On July 3, 1944, plaintiff married Walter Henzel in Reno, Nevada. Henzel had on that day obtained a decree of divorce in a Nevada court from Dorothy Henzel, a New York resident. She had been served only by publication and did not appear. Immediately following the divorce and remarriage plaintiff and Henzel returned to New York. On August 3, 1944, Dorothy Henzel instituted a separate maintenance proceeding against Walter in a New York court and this proceeding resulted in a decree in her favor, awarding separate maintenance and declaring the Nevada divorce null and void. Plaintiff had ceased living with Henzel immediately after service of summons in Dorothy Henzel's suit against him, and in January 1945 she filed suit against him for annulment of their marriage. On June 6, 1947 the New York court entered an interlocutory decree which became final three months later, declaring the nullity of the marriage of plaintiff and Henzel on the ground that he had another wife living at the time of the marriage.

"Defendant had made all the alimony payments due under the Illinois decree to and including that due on July 1, 1944. After the Nevada marriage some correspondence ensued between New York counsel for plaintiff and defendant's counsel relative to further payments. Defendant claimed a credit on account of some advances previously made to plaintiff. The matter was settled by the remittance of $180 in full on the payments due June 1 and July 1. In acknowledging the receipt of this amount by letter of September 8, 1944, plaintiff's counsel stated, 'This remittance satisfies in full the

alimony claim of the former Mrs. Leib.' Plaintiff was remarried in November 1947" (T. R., pp. 87-88).

The Contested Issues.

1. Was the defendant relieved of his obligation to pay alimony by his payment of two months' past-due alimony?

2. Did plaintiff's entry into a void marriage ceremony with Walter Henzel in Nevada (plaintiff and Henzel being domiciled in New York) constitute a "remarriage" relieving the defendant of his obligations under an Illinois decree requiring defendant to pay alimony "for so long as plaintiff shall remain unmarried"?

3. Are the decrees of New York, which had jurisdiction of the necessary parties and subject matter, holding Henzel's Nevada divorce invalid and his remarriage void *ab initio* entitled to full faith and credit in Illinois?

Assignments of Error.

1. The Court of Appeals erred in refusing full faith and credit to the New York decrees which adjudged the Henzel divorce in Nevada to be void and the plaintiff's remarriage to Henzel to be a nullity.

2. The Court of Appeals erred in holding the defendant discharged from his alimony obligations by plaintiff's void remarriage.

PROPOSITIONS OF LAW.

I.

Was There a Valid Remarriage?

A. The burden of proof of any affirmative defense is upon the defendant who asserts it. Therefore, the defendant had the burden of here establishing his discharge or release from alimony obligations.

Lynch v. *Central States Life Insurance Company*, 281 Ill. App. 511 at 518;
Kerr v. *Schrempp*, 325 Ill. App. 614 at 617, 60 N. E. (2d) 636;
38 Corpus Juris 1327, n. 81; 53 Corpus Juris 1277.

B. Where one pays only that which he is required by law to pay, such payment cannot constitute a legal consideration for the "release" of other and additional obligations.

Farmers and Mechanics' Life Association v. *Caine*, 224 Ill. 599 at 606, 79 N. E. 956;
Hayes v. *Massachusetts Mutual Life Insurance Company*, 125 Ill. 626 at 638, 639, 18 N. E. 328, 1 L. R. A. 303.

C. A statement of a party, based upon a mistaken belief that her remarriage was valid, to the effect that her former husband was relieved from future liability, does not preclude her from recovering that to which she is legally and equitably entitled.

Moore v. *Shook*, 276 Ill. 47 at 54, 55, 114 N. E. 592;

Darst v. *Lang*, 367 Ill. 119 at 122-124, 10 N. E. (2d) 659.

D. A mere statement, or even an agreement of the parties, is wholly ineffective to terminate an obligation for alimony under an Illinois decree, unless and until such agreement is approved by the court granting the divorce.

Walter v. *Walter*, 189 Ill. App. 345.

E. Under Illinois law, even a court cannot relieve a defendant from liability for past-due alimony, as the right thereto is vested. It is only a provision as to future payments which a court may modify.

San Fillippo v. *San Fillippo*, 340 Ill. App. 353, 92 N. E. (2d) 201;
Craig v. *Craig*, 163 Ill. 176 at 184, 45 N. E. 153;
Igney v. *Igney*, 303 Ill. App. 563 at 571, 25 N. E. (2d) 608.

II.

Was There a Valid Remarriage?

A. The burden of proof was upon the defendant to show the plaintiff's remarriage to be valid. He failed in that proof when it was shown that New York, which had jurisdiction over the parties and subject matter, had held such remarriage to be void *ab initio*.

Williams v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
Johnson v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

B. A "remarriage," prescribed by a statute or divorce decree, contemplates, not a hollow ceremony, but a valid marriage imposing legal obligations upon the new spouse.

Shamblin v. *State Compensation Commissioner*, 122 W. Va. 652, 12 S. E. (2d) 527 at 529;
Sherman v. *Federal Security Agency*, 166 F. 2d 451, 453-454.

C. Where the defendant's liability arose under an Illinois decree of divorce, the remarriage which would discharge him from liability must be such a remarriage as Illinois would recognize as valid, irrespective of its status in Nevada. Illinois does not recognize such a remarriage as valid.

Jardine v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645;
Lincoln v. *Riley*, 217 Ill. App. 571 at 575;
People v. *Shaw*, 259 Ill. 544, 102 N. E. 1031.

D. Illinois is not bound to, and does not, recognize as valid a Nevada remarriage of persons domiciled in another state, where the supposedly divorced spouse of the of them was not personally served and entered no appearance in Nevada.

Jardine v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645;
Atkins v. *Atkins*, 393 Ill. 202 at 207 et seq., 65 N. E. (2d) 891.

E. Under Illinois law, a marriage to one who already has a wife living is absolutely void from inception and requires no decree of court to establish its invalidity.

Cartwright v. *McGown*, 121 Ill. 388, 12 N. E. 377 at 395;
38 Corpus Juris 1294, §§45, 48.

F. There is a vast difference between a remarriage which is in violation of a directory provision of a statute and a remarriage which is bigamous. The first is *malum prohibitum* and is not void where performed. The second is *malum in se* and is void everywhere.

Restatement of the Conflict of Laws, §§129-132;
38 Corpus Juris, 1277, 1294-1296.

III.

Are the New York Decrees Entitled to Full Faith and Credit?

A. The divorce decree of a state other than the domicile of the parties is entitled to full faith and credit only where one of two conditions appears: (a) the defendant appears and contests the proceedings; or, (b) the defendant is personally served with process.

Williams v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
Esenwein v. *Commonwealth of Pennsylvania*, 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608;
Sherrer v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429;
Johnson v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

B. Nevada does not hold valid its own divorce decrees where there was no bona fide domicile of one seeking a divorce in that state.

Aspinwall v. *Aspinwall*, 40 Nev. 55, 184 P. 810;
Walker v. *Walker*, 45 Nev. 105, 198 P. 433;
Lewis v. *Lewis*, 50 Nev. 419, 264 P. 981, rehearing denied, 50 Nev. 419, 267 P. 399;
Latterner v. *Latterner*, 51 Nev. 285, 274 P. 194.

C. The state of domicile (here, New York) may pass upon and determine the matrimonial status of its citizens, if a foreign adjudication was in a mere *ex parte* proceeding.

Williams v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577;
Sherrer v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429.

D. The decrees of New York, which had all parties to those questions personally present, adjudging the Henzel divorce invalid and plaintiff's remarriage a nullity, are entitled to full faith and credit in all states, including Illinois and Nevada.

Sherrer v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429;
Johnson v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

E. The defendant, as well as all third persons, is bound by the New York decrees, where the parties to such decrees were personally present before the court.

Johnson v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

ARGUMENT.

Introduction to Issues.

There are no factual issues to quibble over. The questions of law are important ones and should be squarely adjudicated to settle any doubt remaining in similar cases.

From the Statement of Facts concisely set forth by the Circuit Court of Appeals for the Seventh Circuit, we have the following situation. Appellant, whom we will hereafter refer to as "plaintiff," was divorced from the appellee, hereinafter called "defendant," in 1939. The decree was an Illinois decree requiring the payment of $125 a month "for so long as the plaintiff shall remain unmarried." No alimony payments have been made for the months of August 1944 to November 1947, inclusive, at which latter time the plaintiff married Sutton. This leaves, prima facie, $5,000 due under the Illinois divorce decree, unless the defendant was properly entitled to a summary judgment upon either of his two affirmative defenses, which we will discuss shortly.

Before going into that, however, we do want to emphasize that the obligation is an Illinois obligation, and, under the well-settled rules of this Court, the federal court must determine whether or not Illinois courts passing upon these issues would hold the defendant discharged. It is for that reason, except for questions as to full faith and credit, that we have cited Illinois cases almost exclusively. If the defendant contends he was released, we must consider whether Illinois would consider him released; if he contends that plaintiff "remarried" in 1944, we must consider whether such ceremony constituted a remarriage within the contemplation of the Illinois decree. Necessarily, of course, the efficacy of acts in New York and Nevada, so far as full faith and credit are concerned, will

be determined by this Court's decisions, and it is upon such citations which we rely.

We start, then, with the Illinois divorce decree requiring the defendant to pay alimony. Looking to Illinois acts alone, the defendant appears to be liable for the $5,000 which he is in arrears. He has the burden of proving an affirmative defense to escape liability. There are two possible affirmative defenses, and defendant relies upon both. They are, briefly, as follows.

1. *By a release from the plaintiff.* To determine this question, we must look to Illinois law, as did the Court of Appeals. The District Court found for the defendant upon this issue, but the Court of Appeals reached a different conclusion. Illinois holds, as we shall point out, that an agreement to release one from alimony obligations is ineffective unless approved by the court which granted the divorce. Admittedly, such court approval was never secured. Illinois also holds that even the court entering the alimony decree cannot relieve the defendant from obligations for "accrued" alimony, as these rights are vested—but such court can only reduce or eliminate "future" obligations. Furthermore, it is the universal rule that where one pays only that which he is legally obligated to pay, such payment constitutes no consideration for a release of a separate and independent obligation. These matters we will discuss in Section I.

2. *By fulfillment of the provision of the decree* requiring payment of alimony "for so long as the plaintiff shall remain unmarried." It is obviously right that one man's obligation to pay alimony should cease when another man's obligation to support the ex-wife commences. However, if the remarriage ceremony is an absolute nullity, the same reasons are not present. Illinois holds a

marriage absolutely void where one spouse has a wife living in his domicile from whom he was not validly divorced. We believe the Nevada divorce was invalid, and that the New York decrees establishing the remarriage to be void ab initio are entitled to full faith and credit. These questions will be discussed under Sections II and III.

Now, with reference to the first defense, which we discuss in Section I following, perhaps that material should have been deleted. The Court of Appeals found adversely to the defendant thereon. *The defendant prosecuted no cross-appeal to this Court.* As we understand the Rules, the determination of the Court of Appeals is final as to issues not presented to this Court by cross-appeal. But since this Court might take a different view upon that procedural question, out of an excess of safety we have discussed this aspect of the case briefly.

With this introduction to explain our approach to these questions, we are abbreviating the following discussion so far as possible to serve the convenience of this Court.

I.

Was There a Valid Release?

A. The burden of proof of any affirmative defense is upon the defendant who asserts it. Therefore, the defendant had the burden of here establishing his discharge or release from alimony obligations.

The statement is self-explanatory, and all authorities agree that one pleading a discharge from liability bears the burden of establishing his defense. It was, therefore, incumbent upon the defendant to show the manner in which the Illinois decree, imposing his obligation, was satisfied. If a court were required to resort to conjecture to determine this issue, such burden of proof would not be satis-

fied. However, we believe the Statement of Facts of the Court of Appeals shows the facts to be undisputed, presenting clean-cut legal issues.

B. Where one pays only that which he is required by law to pay, such payment cannot constitute a legal consideration for the "release" of other and additional obligations.

The defendant was obligated to pay the plaintiff $250, which he was in arrears for the months of June and July 1944. When plaintiff demanded payment of this accrued amount, the defendant claimed credit or $70, which he said he had advanced to her previously. Accordingly, he sent the plaintiff only $180 for those two payments, which sum the plaintiff accepted. There was no dispute that this $180 was owing, but defendant has claimed that this sum was a consideration for the plaintiff writing a letter acknowledging such payment "in full of alimony claimed" (T. R., pp. 60-66). There was no formal written release, but defendant claimed that this letter and other correspondence released him.

As the Court of Appeals pointed out, since the defendant had to pay the $180 irrespective of whether the plaintiff had remarried or not, this same sum of money could not constitute a legal consideration for a release of "future" alimony. This position is obviously correct. It is only where a demand is disputed and unliquidated that a payment can constitute a consideration for a release from a larger asserted liability. If the amount is liquidated and ascertainable, the discharge is only one *pro tanto*. Illinois adheres to this rule (infra, p. 17).

This is most easily illustrated by a simple example. James Clarke, let us say, takes out a life insurance policy for $10,000 with double indemnity for accidental death. He is drowned on a picnic, after the incontestable period has run. The insurance company claims that the circum-

stances were such as to make it probable that Clarke committed suicide. It denies liability for the double indemnity, although admitting liab' ity for the face of the policy. It tenders a check for $10,000 to the widow, which she accepts, and she executes a release. A week later, upon receiving legal advice, she sues for the $10,000 claimed to be due for the double indemnity. She can recover, provided she proves accidental death. The release is wholly ineffective to bar the suit. The company merely paid what it was legally obligated to pay without dispute, and there was no legal consideration for the release of the disputed item.

C. A statement of a party, based upon a mistaken belief that her remarriage was valid, to the effect that her former husband was relieved from future liability, does not preclude her from recovering that to which she is legally and equitably entitled.

The courts used to be quite stringent in distinguishing between mistakes of fact and mistakes of law. Illinois does not fall in this category. *Darst* v. *Lang*, 367 Ill. 119 at 122-124, 10 N. E. (2d) 659. Even if we were incorrect in our prior statement that there was no valid release, because there was no legal consideration, the plaintiff would still recover because of the Illinois attitude as to a release executed under a mistaken belief. Even if Mrs. Sutton had executed a formal written release for a consideration to the defendant, but had done so upon the mistaken belief that she was then married to Henzel, or that her remarriage discharged the defendant's obligation, equity would grant her relief.

This general rule is pointed out in *Moore* v. *Shook*, 276 Ill. 47 at 54, 55, 114 N. E. 592, where the court points out that a mistaken belief as to marital status is considered a mistake of fact; but irrespective of how it is considered, it is such a mistake as will permit equity to extend relief. This rule would control here.

D. A mere statement, or even an agreement of the parties, is wholly ineffective to terminate an obligation for alimony under an Illinois decree, unless and until such agreement is approved by the court granting the divorce.

Illinois does not recognize as valid a contract or agreement which purports to terminate alimony obligations, *unless such contract is approved by the court granting the divorce and retaining jurisdiction over the subject matter.* The reason for our rule is that we believe the State is an interested party to all matrimonial actions. We require court approval in order to make certain that no woman shall be left without support or shall become destitute. Otherwise it would be a simple matter for an ex-husband to dangle a few thousand dollars before a gullible woman's eyes and to induce her to exchange her future security for a present mink coat. After the money was dissipated, the woman might become a ward of the state.

The Illinois rule is announced in many cases. An excellent annotation of leading cases upon this question is contained in *Walter* v. *Walter,* 189 Ill. App. 345 at 348, 349, quoting, among other cases, *Audubon* v. *Shufeldt,* 181 U. S. 575. The general principle is stated by our court to be that "laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement."

E. Under Illinois law, even a court cannot relieve a defendant from liability for past due alimony, as the right thereto is vested. It is only a provision as to future payments which a court may modify.

This rule is accepted law in Illinois and was adopted by the Court of Appeals in its opinion. Actually, it is not pertinent here, since the defendant has not contended that the Illinois court at any time modified its alimony order so as to discharge him. But the doctrine illustrates the lengths to which our Illinois courts go to protect one who

is dependent for support upon alimony payments. The husband could not have been discharged from his accrued obligations by anyone—even the Illinois court. Therefore, since his obligation of $180 was an item which could not have been terminated or reduced, it could not provide a consideration for reducing or terminating future obligations. This leaves only one possible avenue for escape for the defendant—that is, to establish that there was a valid "remarriage" of the plaintiff. As we shall point out in Sections II and III, there was no valid remarriage.

To illustrate the point last discussed, however, let us look at a recent Illinois case, which also deals with the question of release. Last year, the decision of *San Fillippo* v. *San Fillippo,* 340 Ill. App. 353, 92 N. E. (2d) 201, was rendered. The facts were as follows. The divorce was rendered in 1947 and provided for $50 a week alimony, plus the payment of certain outstanding obligations. On March 1, 1948, a petition was filed by the wife to require the defendant to show cause why he should not be held in contempt for failure to pay total arrearages of $2,316, consisting primarily of alimony. On that date an agreed order was entered by the court as follows:

> "On Motion of Attorney for Plaintiff for a Rule to Show Cause and the Plaintiff and Defendant agreeing to settle & dispose of the matter with reference to alimony arrearage, past, present, & future, and any other claims outstanding at present time; And the Defendant offering sum of $500.00 in full of all alimony and attorneys fees, past, present, & future. And the Plaintiff is willing to accept the sum of $500.00 in full of all Alimony, past, present & future; And the Court having jurisdiction over parties and the subject matter:

"It is hereby ordered that the sum of $500.00 tendered to Plaintiff by Defendant & the acceptance of said sum by Plaintiff is in full of all claims for alimony, past, present & future herein.

"Enter GEORGE M. FISHER
"Judge."

Subsequently, the plaintiff secured a new attorney and filed a petition to set aside such order as not based upon a valid consideration and as being entered without proper jurisdiction. The court made three primary holdings: (1) That the provision for alimony contained in the original decree could not be modified by subsequent court order, except as to future alimony where a change of financial circumstances is shown; (2) In the absence of an express petition by the husband asking relief based upon a change of circumstances, even the court which entered the divorce decree had no jurisdiction to modify such decree, and the modification was void; (3) That the purported settlement for $500.00 was not effective to bind the plaintiff.

II.

Was There a Valid Remarriage?

A. The burden of proof was upon the defendant to show the plaintiff's remarriage to be valid. He failed in that proof when it was shown that New York, which had jurisdiction over the parties and subject matter, had held such remarriage to be void *ab initio* (T. R., pp. 27-28; 33-34).

Illinois, until the present hearing in the District Court, had no occasion to pass upon the validity of the remarriage of the plaintiff to Henzel. Nor has Nevada passed

upon this question. But New York, the state of plaintiff's and Henzel's domicile, has passed upon this question, and it has decreed such marriage to be void *ab initio*, in a proceeding in which plaintiff and Henzel appeared and litigated this very issue. Surely, with this a primary question for determination here, this New York decree cannot be ignored. It is entitled to full faith and credit and concludes this issue.

It does not seem that the domicile of the parties is to be ignored for all purposes. For example, the language of this Court seems pertinent in *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411, where it was stated:

> "That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that state is not disputed * * *. Here, unlike the situation presented in *Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated."

When New York was the domicile of the parties, namely, plaintiff and Henzel, and had jurisdiction to determine the validity of their marriage, its decree would seem to be conclusive for all purposes and in all states. Illinois will not refuse to accord it full faith and credit.

B. A "remarriage," prescribed by a statute or divorce decree, contemplates, not a hollow ceremony, but a valid marriage imposing legal obligations upon the new spouse.

There is sound reason for this rule. A provision discharging a man from alimony obligations upon remariage

of his former wife contemplates that a woman is not ordinarily entitled to support from two husbands at the same time. When a new husband's obligation of support commences, the former husband's obligation terminates. But, if the new marriage is wholly void, so that the new spouse does not become liable for such support, a different rule must follow, for two reasons. One is that such provision for the termination of alimony never contemplated a release from liability except by the substitution of someone to take over the support obligation. Second, is the rule of public policy which envisions that the woman might otherwise become a ward of the state.

For the same reason of public policy, the courts will not indulge in technicalities of construction. They are not interested in a mock ceremony or a void marriage—but in a real substitution of one whose duty it is to furnish support in the stead of another. Unless the realities of the situation so appear, there is no "remarriage."

C. Where the defendant's liability arose under an Illinois decree of divorce, the remarriage which would discharge him from liability must be such a remarriage as Illinois would recognize as valid, irrespective of its status in Nevada. Illinois does not recognize such a remarriage as valid.

For the same reasons as just indicated in B, above, we must look directly to the public policy of Illinois. Assume, for the moment with us, that Henzel's Nevada divorce was invalid. (If it was valid, then New York was wrong, the defendant is correct, and this controversy can end here and now.) Then, when Henzel and the plaintiff went through a form of wedding ceremony, Henzel already had a wife living, and the second marriage was bigamous. Illinois holds such a marriage to be void.

In *People* v. *Shaw*, 259 Ill. 544, 102 N. E. 1031, Shaw was convicted of bigamy in Illinois, but the conviction was

reversed by our Supreme Court upon the following facts. Shaw married Lenore Smith in Chicago, but before that time he had married Helen Olson in New York. Helen Olson's history was, however, that she had been previous married to Edward Olson in New York, but Olson procured a divorce in California upon the ground of desertion, with service of process being made only by publication upon Helen Olson. The defense of Shaw was that his marriage to Helen Olson was null and void, because the Olson divorce in California was not effective. With this contention our Illinois court agreed. The court declared:

> "Plaintiff in error contends that by reason of the foregoing facts his alleged marriage to Helen Olson in New York City on September 19, 1900, was null and void, and that he therefore did not commit the crime of bigamy by marrying Lenore Smith on November 28, 1910. Counsel for the State contend that Helen Olson and plaintiff in error were residents of Illinois at the time of their marriage and were in the State of New York temporarily at that time. It is not necessary to determine what effect, if any, that would have on the validity of that marriage, as it conclusively appears from the evidence that Helen Olson was at that time, and had been for several years, a resident of the State of New York. Under the laws of New York this marriage was void, (*People* v. *Baker*, 76 N. Y. 78; *O'Dea* v. *O'Dea*, 101 id. 23; *Williams* v. *Williams*, 130 id. 193); and as the law of New York must control as to the validity of the marriage, (*McDeed* v. *McDeed*, 67 Ill. 545; *Canale* v. *People*, 177 id. 219; *Reifschneider* v. *Reifschneider*, 241 id. 92); it must be held to be void in this State. His marriage with Helen Olson being invalid because of her inability to enter into the contract, plaintiff in error did not

commit bigamy by his later marriage with Lenore Smith."

It is apparent that Illinois holds the domicile to control upon the efficacy of a marriage, and, where the parties are domiciled either in Illinois or New York, a bigamous remarriage is completely void.

D. Illinois is not bound to, and does not, recognize as valid a Nevada remarriage of persons domiciled in another state, where the supposedly divorced spouse of one of them was not personally served and entered no appearance in Nevada.

To continue the train of thought from section C, above, Illinois now holds such a decree as Henzel's Nevada decree to be void for lack of domicile. *Atkins* v. *Atkins*, 393 Ill. 202 at 207, 208, 65 N. E. (2d) 801. But there is even a more interesting case decided by Illinois quite parallel with the existing situation, which illustrates the construction Illinois places upon the "remarriage" as affecting defendant's obligations under his Illinois alimony decree.

In *Jardine* v. *Jardine*, 291 Ill. App. 152, 9 N. E. (2d) 645, Jardine left New York State in 1931 and went to Reno, where he established a six weeks' residence and secured a divorce from his New York wife. He left Nevada the same day and married the plaintiff in Illinois, and they both then went to New York. The plaintiff in 1935 brought an action in Illinois to have her marriage to Jardine declared a nullity upon the ground that it was bigamous and void, contending that the Reno divorce was invalid. The court declared:

"Since the Nevada court was without jurisdiction and therefore without power or authority to enter its divorce decree, such decree was not legally effective to sever the marital relation exist-

ing between the defendant and his then wife. That divorce being void, defendant was not free to remarry and his marriage afterward to plaintiff pursuant to it was also void. The invalidity of the marriage of the parties to this proceeding was an established fact since its very inception. * * * ".

E. Under Illinois law, a marriage to one who already has a wife living is absolutely void from inception and requires no decree of court to establish its invalidity.

This, again, is a projection closely connected with B, C, and D, supra. New York held the remarriage to be a nullity. Would Illinois do the same?

In *Cartwright* v. *McGown*, 121 Ill. 388, 12 N. E. (2d) 737, it was declared at page 395:

> "The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to void the same."

This general rule is substantiated by 38 Corpus Juris 1294, 1295, as follows:

> "A person who has contracted a valid marriage is utterly incapacitated, while such marriage remains undissolved by death or divorce, to contract a subsequent marriage; and a purported marriage contracted by one so incapacitated is a mere nullity, and will be declared to be such in any proceeding, direct or collateral, where the question may arise, and no judicial decree is necessary to establish its invalidity. * * * "

If something is a nullity, it is nothing. It is as if it had never happened. *Ergo post propter hoc*, it never hap-

pened and the obligation exists as before. We apologize if our language sounds strangely reminiscent of Ko-Ko in the Mikado, "Consequently, that gentleman is as good as dead—practically, he is dead—and if he is dead, why not say so?"

F. There is a vast difference between a remarriage which is in violation of a directory provision of a statute and a remarriage which is bigamous. The first is *malum prohibitum* and is not void where performed. The second is *malum in se* and is void everywhere.

Perhaps this is rebuttal in character, but after extensive arguments in two courts, one becomes familiar with defensive arguments and authorities. We request this Court to bear one legal proposition in mind while reading defensive briefs. It is as follows.

If Henzel was validly divorced by his Nevada decree, then New York was wrong and we have no right to recover. If he was not divorced, then his marriage to plaintiff was bigamous. As such, the remarriage was in violation of public policy and void everywhere. It is *malum in se*.

This must be distinguished from the violation of a purely directory provision of a statute. Indiana grants a divorce, let us say, but slaps both parties upon the wrists and tells them, "Now don't get remarried for a year." But one party moves to Virginia and does remarry. Now there is nothing offensive to public morals in such remarriage; there is nothing which is repugnant to universal public policy. There is no bigamy. The remarriage, while violative of the Indiana statute, would be merely *malum prohibitum* and recognized everywhere except, perhaps, Indiana and, under many circumstances, Indiana would be required to recognize the remarriage as valid.

We ask the Court to bear this distinction in mind in reading cases cited by the defendant.

III.

Are the New York Decrees Entitled to Full Faith and Credit?

A. The divorce decree of a state other than the domicile of the parties is entitled to full faith and credit only where one of two conditions appears: (a) the defendant appears and contests the proceedings; or, (b) the defendant is personally served with process.

The Court of Appeals apparently adopted the view that the decree of divorce may be valid in Nevada but invalid in New York, which threw the court into utter confusion as to how to apply the full faith and credit clause. It finally concluded by giving full faith and credit to the Nevada decree and denying such full faith and credit to the New York decrees, which latter state actually had jurisdiction of the parties, and tried the issues upon the merits (T. R., pp. 27-28; 33-34).

It is our feeling that the recent decisions of this Court have wholly removed any ambiguity. The application of full faith and credit depends upon whether or not the defendant in the divorce action had his or her day in court to contest the various issues, including jurisdiction in the divorcing state to deal with the parties and subject matter. If such defendant was personally served in that state or appeared and contested the issues, this Court has consistently held that the determination by that state is final, and the question cannot be relitigated *ad infinitum*. If, however, that defendant was neither served with process in that state nor had an opportunity to contest the issues upon the merits or pertaining to jurisdiction, a different result must follow. In such an instance, when the courts of the domicile subsequently adjudicate this question between the parties, in a proceeding where both parties ap-

pear and present their arguments, its determination that such divorce was invalid is final. Such decree would then be entitled to full faith and credit in all states, including the state which had granted the divorce.

This rule was clearly laid down by Mr. Justice Frankfurter in the second *Williams* case, 325 U. S. 226, 65 S. Ct. 1092 at 1095, 89 L. Ed. 1577, when he stated:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated between the parties."

It seemed to us that the language of this Court was very clear, but fundamentally the same question again arose in *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429. Mr. Chief Justice Vinson expanded these holdings, speaking as follows in 68 S. Ct. 1087 at 1089, 1093:

> "That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that state is not disputed. * * * Here, unlike the situation presented in *Williams* v. *North Carolina*, 1945, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366, the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated. * * * It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing to hold that the vital rights and

interests involved in divorce litigation may be held in suspense pending the scrutiny by sister States of findings of jurisdictional facts made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and *in which the defendant has participated.*" (Italics added.)

In its last declaration in *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411, this Court used similar language:

> "It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce, by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree."

Now the effect of those decisions seems clear. If Nevada had required Dorothy Henzel to be personally served, or if she had appeared and contested the issues in that state, both New York and Illinois would be required to give full faith and credit to its decree. The same result does not follow as to an *ex parte* proceeding. To the contrary, when New York had jurisdiction over the parties who appeared and litigated the matter of the validity of the divorce decree, the decision of New York was absolutely binding upon them and was entitled to full faith and credit in every state in the nation—including Nevada. Marital rights and obligations must be settled with some finality. A man cannot be divorced in one state and married in another, any more than a nation can exist half slave and half free.

Forgetting the divorce situation entirely, assume that John Jones secures a judgment by confession against James Brown in Cincinnati, Ohio. At that time James

Brown lives in Chicago and John Jones takes his Ohio judgment and sues Brown in Illinois upon it. Brown defends the case and affirmatively proves that the note was secured by fraud. The Illinois court not only denies relief to the plaintiff but enters a declaration that the note is void and invalid, and that the judgment procured in Ohio is unenforceable. It would be a strange anomaly if John Jones, later finding Brown in Virginia, could institute a new suit in Virginia upon the same obligation and require Brown again to establish his non-liability. Nor could Jones claim that Virginia should recognize the Ohio judgment rather than the Illinois holding.

In this case, we do not feel that Dorothy Henzel was required, after winning her case in New York, to go to Nevada to adjudicate again the same matter. Nor do we believe it was incumbent upon the petitioner here, after New York had held the Henzel divorce decree invalid and the petitioner's remarriage to be void *ab initio*, to go to Nevada to secure another decree to the same effect—particularly when she could not even have secured personal service upon Walter Henzel if she had done so. Nevada, as a sister state in our union, was and is bound to give full faith and credit to the actions of New York, which had determined these questions after full appearance and contest by all parties in interest.

B. Nevada does not hold valid its own divorce decrees where there was no bona fide domicile of one seeking a divorce in that state.

Actually, it seems immaterial as to the holdings in the State of Nevada upon like questions. However, Nevada has repeatedly held that a divorce decree rendered in that state is nugatory, where a domiciliary of another state goes there merely for the purpose of procuring a divorce and departs immediately thereafter. In *Aspinwall v. Aspin-*

wall, 40 Nev. 55, 184 P. 810, Nevada pointed out that the question of domicile was vital in determining jurisdiction. In *Walker* v. *Walker*, 45 Nev. 105, 198 P. 433, the court declared:

> "Residence in this state for the statutory period * * * is not sufficient to give jurisdiction, but a bona fide residence with the intention of remaining must appear."

In the other cases cited under our "Propositions of Law" it is pointed out that the statutory requirements in that state were adopted to prevent the abuses of its laws which had led to great criticism, and that a bona fide domicile was absolutely essential in order for its court to obtain jurisdiction to grant a divorce decree.

Under these circumstances, it is apparent that Nevada would have reached a result similar to that of the State of New York under the facts of this case, and there is no reason to believe that Nevada would deny full faith and credit to the New York holdings. Under the provisions of our Constitution, Nevada is bound by the result in New York.

C. The state of domicile (here, New York) may pass upon and determine the matrimonial status of its citizens, if a foreign adjudication was in a mere *ex parte* proceeding.

The above statement had always been considered to be the law, prior to the second *Williams* case. We believe there is no question that it is still the law. As stated in *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429:

> "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing * * *"

We presume that the above language recognizes the continuance of the former rule permitting an examination by the state of the domicile of all questions pertaining to jurisdiction of a court which acted in a mere *ex parte* proceeding, as here.

D. The decrees of New York, which had all parties to those questions personally present, adjudging the Henzel divorce invalid and plaintiff's remarriage a nullity, are entitled to full faith and credit in all states, including Illinois and Nevada.

Without reiterating the matters discussed under paragraph A, supra, we believe that the language of those cases is conclusive upon this issue. This Court has repeatedly pointed out that, where jurisdictional questions have been litigated once between the parties, they cannot be relitigated in another forum. In this case, those issues were fully litigated in New York, and all the parties involved in those controversies had an opportunity to raise any question desired, either in support of the Nevada acts or in opposition thereto. The New York courts necessarily had to determine the questions of domicile, *bona fides* of Walter Henzel in going to Nevada, and other questions involved in the matter of jurisdiction. Thereafter, the decrees of New York were conclusive upon all persons, and those decrees must be given full faith and credit by all other states.

E. The defendant, as well as all third persons, is bound by the New York decrees, where the parties to such decree were personally present before the court.

There was, of course, no occasion for the present defendant to be made a party to the New York annulment proceedings or to the Henzel separate maintenance suit.

Nevertheless, that does not preclude such decrees from being binding and operative upon the defendant, as well as all third persons. An excellent illustration of this arises in *Johnson* v. *Muelberger*, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411. There, a daughter of one of the parties sought to attack in New York the validity of a decree rendered in Florida. This Court pointed out that where the court actually had jurisdiction of the parties and subject matter, that the decree could not be attacked either by parties to the proceeding or by strangers, and that it was conclusive upon them.

Summary.

From the foregoing discussion, it is apparent that several matters must be accepted as conclusive: (1) New York, in a proper proceeding, has already held Henzel not to have been divorced when he entered into a marriage ceremony with the plaintiff, and it has also held the marriage to be void *ab initio;* (2) Such decrees, rendered with jurisdiction over the parties and subject matter, are conclusive upon the parties to them and strangers to the proceedings, and must receive full faith and credit in all jurisdictions; (3) Illinois would, if the same situation were presented to it for determination as was presented to New York, arrive at the same result; (4) The remarriage was not such a remarriage as Illinois contemplated as relieving the defendant from his obligations, and was ineffective for that purpose; (5) There was no valid discharge of the defendant's obligation arising under the Illinois alimony decree.

For the above and foregoing reasons, it is respectfully prayed that the respective orders and judgments of the Court of Appeals for the Seventh Circuit and of the United States District Court for the Southern District of Illinois, be reversed and the cause remanded with directions to enter judgment for the plaintiff for said accrued ali-

mony in the amount of $5,000, together with interest from the time of its accrual, and court costs incurred in these various proceedings, and for such other and further relief as may seem fitting and proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 143.

VERNA LEIB SUTTON,
Plaintiff-Appellant,

vs.

R. WELLS LEIB,
Defendant-Appellee.

REPLY BRIEF OF APPELLANT.

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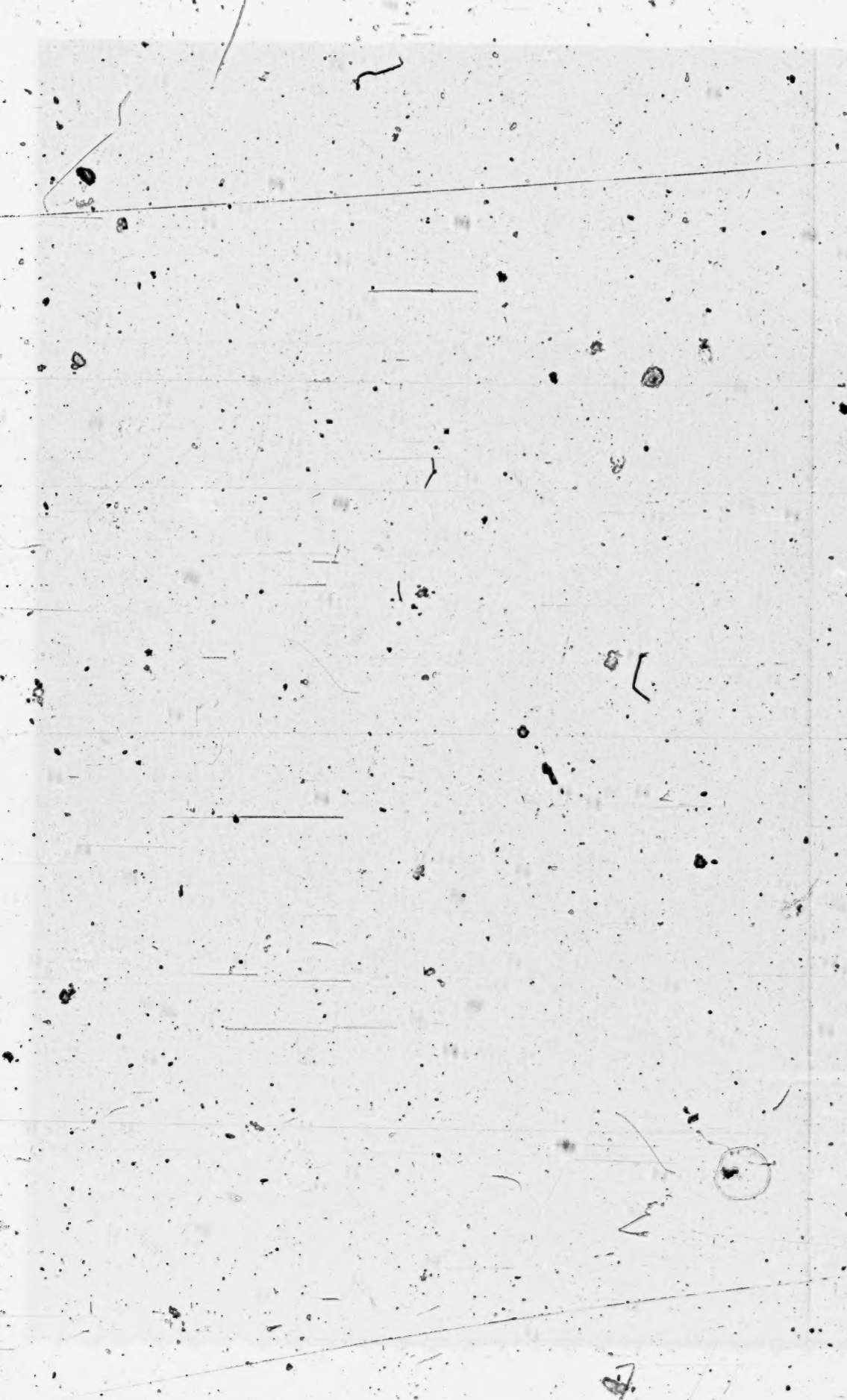

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IN THE

Supreme Court of the United States

October Term, 1951.

VERNA LEIB SUTTON, *Plaintiff-Appellant,* vs. R. WELLS LEIB, *Defendant-Appellee.*	No. 143.

REPLY BRIEF OF APPELLANT.

The brevity of appellee makes it possible for this reply brief to be concise. It seems necessary only to examine a few of appellee's statements and supporting authorities. We concur in his correction of the Statement of Facts pertaining to the Court of Appeals' opinion. Alimony had been paid up to "May 1, 1944" and not "July 1". Appellee's payment of $180.00 ($250.00 minus $70.00 credit) took care of the June and July payments.

Before going to any discussion of cases, however, we must challenge appellee's last sentence of the first paragraph of the Argument. It is as follows: "In other words, can the plaintiff-appellant marry, annul, remarry and annul, and collect alimony between her successive marriages following her successive annulment decrees."

Now, let us get the facts straight. There was only one annulment decree at any time—and defendant's liability does not arise from that. The defendant's liability arises

from an alimony decree entered, for his fault, by an Illinois court in 1939 (Tr. 5, 6). If nothing had intervened until plaintiff's remarriage to Sutton in November, 1947, the defendant could not have claimed that he had been relieved from liability at any prior time. Plaintiff, however, entered into a marriage ceremony with Henzel in Nevada in 1944 and defendant claims that this extinguished his liability.

If we are correct in our position, obviously defendant's reasoning is wrong. Defendant takes the position that his liability was extinguished by the Nevada ceremony and revived by the New York annulment. We believe, rather, that the Nevada ceremony was void *ab initio* as bigamous since Henzel already had another wife living, from whom he was not validly divorced. Therefore, the Nevada ceremony was a nullity from its inception and required no decree of annulment to declare it so (Appellant's Brief, 6-8, 17-23). Accordingly defendant's obligation was never extinguished. In view of our previous full discussion of this question, no further discussion seems necessary except to distinguish appellee's cases.

First, however, it seems clear that defendant no longer insists that there was a "release" of the obligation. He admits: "The correspondence discloses beyond question that there was no demand for, or settlement of, alimoney (sic—alimony) to become due *in futuro*. * * * In his findings the trial court inadvertently used the word 'release.' * * * . * * * release was not pleaded as a defense by the defendant. The entire controversy in the trial court turned upon the single question of whether the plaintiff, Verna Leib, had entered into a valid marriage contract in Nevada with Walter Henzel" (Appellee's Brief, 7, 8. See also p. 4 under "The Contested Issues").

Accordingly, we may accept this as an admission by appellee that the trial court's *reason* for its decision was

erroneous in this regard; that appellee does not here contend that there was a valid release; and that the sole issues are the validity of the remarriage in Nevada and its effect so far as the Illinois alimony decree is concerned. If there was a valid remarriage within the contemplation of the Illinois decree, the defendant is discharged. If there was not a valid remarriage for this purpose, the defendant remains liable. This greatly narrows down and simplifies the controversy.

To sustain his contention that the remarriage in Nevada was legally valid, defendant relies largely upon the Restatement of Conflict of Laws, certain language from the two *Williams* cases, and three Illinois cases—namely *Peirce* v. *Peirce*, 379 Ill. 185; *Criss* v. *Industrial Commission*, 348 Ill. 75; *Stevens* v. *Stevens*, 304 Ill. 297. These are the only cases discussed in his Argument. Let us look briefly at these authorities.

Looking first to the Restatement, appellee quotes from Section 121 and says: "Except as stated in 131 and 132 (polygamy, incestuous, etc.) a marriage is valid * * *." The first word in parentheses answers appellee's contention. When Henzel had a wife living from whom he was not validly divorced, his marriage to plaintiff was polygamous—since bigamy is, in legal effect, polygamy.

Turning to Section 132 of the Restatement, we find that it expressly states that: "A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

(a) polygamous marriage."

That is the situation which we have here. Since Henzel is not permitted to have two wives simultaneously, the law refuses to recognize as valid his attempted marriage to plaintiff upon July 3, 1944. This situation is to be

distinguished from that set up in Sections 130 and 131 where a party such as Henzel may have been validly divorced but forbidden to remarry within a certain period fixed by law. And eminent counsel for the appellee have consistently, and do even now, fail to distinguish between these two situations.

In *Peirce* v. *Peirce*, 379 Ill. 185 (cited as *Pierce* v. *Pierce*), no bigamous relationship was involved. Harry Peirce left his wife in Illinois and went to Mexico where he married another woman. They then moved to Nevada. His Illinois wife procured a divorce. Nevada at that time recognized common law marriages. Later Peirce died and the present proceedings dealt with legitimacy of the children of the common law marriage. The court expressly stated (p. 190) that there was no question that the Mexican marriage was wholly void. However, the living together of Peirce and his second wife as domiciliaries of Nevada *after the Illinois wife divorced Peirce,* established a valid common law marriage in Nevada. Even then, our court added (pp. 190, 191):

> "We are not called upon to recognize the common law or however designated marriage of Era Peirce and deceased in Nevada as valid, contrary to the public policy of this State. We do, however, recognize the effect of the attainment of marital status under the laws of Nevada insofar as it operates to make the children legitimate."

This scarcely supports appellee's position. The case next argued is *Criss* v. *Industrial Commission,* 348 Ill. 75. This was a case falling squarely under Section 131 of the Restatement. Eva Criss divorced her first husband in Alabama on November 5, 1919, and remarried upon November 27, 1919, in Illinois where she and her second husband thereafter resided. The Alabama decree, pursuant to an Alabama statute, had restricted her from remarry-

ing for a period of 60 days. The Illinois court held that the remarriage would be recognized as valid since the prohibition against remarriage within 60 days would be given no extraterritorial effect. Again there was no polygamous marriage involved.

The third Illinois case argued by appellee is *Stevens* v. *Stevens*, 304 Ill. 297. Eliza Hill Hayes had been living in Illinois for about four years when her husband, whom she had deserted in Arkansas, procured a divorce from her upon March 7, 1912. Illinois at that time had a provision prohibiting remarriage of divorced persons within one year after divorce. In July, 1912, Eliza and William Stevens tried to obtain a marriage license in Illinois which was refused because of the above statute. They went to Indiana, were married, and immediately returned to Illinois. Upon Stevens' death, Illinois held the Indiana marriage, performed between Illinois domiciliaries in violation of Illinois laws, to be invalid. Rather than supporting appellee's contentions, the court declared (p. 302): "the marriage celebrated in Indiana had no other purpose than evading the statute of this state and the marriage was void."

Thus, the result in the *Stevens* case is contrary to that stated by appellee, even though it involves only Section 131 and not Section 132 of the Restatement. In fact, looking at appellee's quotation from that case (Appellee's Brief, 14), we find that what purports to be the end of the sentence is actually not the terminal point. Appellee has omitted the following significant words (p. 300 of opinion): "* * * with certain exceptions, such as marriages which are incestuous according to the generally recognized belief of Christian nations, *polygamous*, or which are declared by positive law to have no validity in the state of the domicile." (Italics supplied.) Surely the omission was inadvertent but the added words show that Illinois accords with the general rule.

Since appellee has not deemed the mass of citations contained under his Propositions of Law to be worthy of discussion in his Argument, we will not discuss those cases at length. Since he now admits there was no release of future alimony, and we admit he was paid up through July 3, 1944, we will not discuss cases cited under I (Appellee's Brief, 3), but only those under II (Appellee's Brief, 4, 5).

Ertel v. *Ertel*, 313 Ill. App. 326, involved merely the question of whether a person had sufficient mentality to enter into a valid marriage in Missouri, the court properly holding that its validity depended upon Missouri law. *Reifschneider* v. *Reifschneider*, 241 Ill. 92, was concerned with the validity of a marriage between persons of less than adult years in Indiana, and Indiana law controlled. *In re Youman's Estate*, 15 N. W. 2d 537, involved the validity of an adoption only. *Travers* v. *Reinhardt*, 205 U. S. 423, dealt with the validity of a common law marriage, similar to *Peirce* v. *Peirce* previously discussed.

Lehmann v. *Lehmann*, 225 Ill. 513, again involved the validity of a remarriage in violation of a one year restrictive provision. The same is true of *Powell* v. *Powell*, 207 Ill. App. 292, and *Loughran* v. *Loughran*, 292 U. S. 216. *Lembcke* v. *United States*, 181 Fed. (2d) 703, also involved a restrictive provision of a decree which was held not to change the status of a Pennsylvania "widow" under a governmental life insurance contract. *Alaska Packers Association* v. *Industrial Commission*, 294 U. S. 532, approved a statute allowing compensation for injuries received beyond state borders. *New York ex rel Halvey* v. *Halvey*, 330 U. S. 610, expressly refrained from passing on the jurisdiction of a Florida court to enter certain judgment decrees, and permitted New York to modify a custody decree entered by Florida.

It will be seen that none of these cases deal with the situation where one man completes his matrimonial in-

volvements with two wives. In none of the appellee's authorities was a polygamous situation discussed. But, in the instant case, Henzel returned to his domicile, New York, still married to his first wife, and, ostensibly, with a new wife as well. Since all states refuse to recognize bigamous marriages, the second marriage was *ipso facto* void and required no decree of court to declare it so. Had the first wife been served with process in Nevada, or entered her appearance in those proceedings, a different result perhaps would have followed—simply because the divorce would then have been valid and Henzel would have been free to remarry. But Nevada obtained no jurisdiction over Dorothy Henzel; it had no jurisdiction to enter its divorce decree; Henzel was not divorced—and the New York residents, namely Walter Henzel, Dorothy Henzel and Verna Leib (the plaintiff) found their legal relationships unaltered by the various steps taken in Nevada prior to July 4, 1944.

We are not going to attempt to discuss the holdings in the *Williams* cases or other more recent decisions of this court. This court is far more familiar than are we with the facts in those cases, the basic reasons for the decisions, and the meaning of the language employed. If we are correct in our original analysis (Appellant's Brief, pp. 8, 9, 24-27), the acts in Nevada were entitled to full faith and credit only if, in the divorce proceedings, Dorothy Henzel had been personally served in Nevada, or had entered her appearance in that State. Since Nevada acquired no jurisdiction over her, the domicile, New York, which had jurisdiction over both Dorothy and Walter Henzel, was left free to inquire into all issues—including that of jurisdiction of the Nevada court. The New York decrees, where the court had jurisdiction of the parties and subject matter, were themselves entitled to full faith and credit everywhere. Furthermore, the remarriage in Nevada was not one relieving the defendant of his obligations

under the alimony decree as construed by previous Illinois decisions (Appellant's Brief, pp. 6-8, 14-22), for reasons of Illinois public policy dealing with the necessity of support for divorced women.

A final word and we are done. Defendant sheds tears (crocodile, we fear) over his situation as an innocent party having had no opportunity to intervene in New York or Nevada. If the whole world is bound by the New York decree, surely the defendant should not complain as a mere member of the universe. After all, how has he been prejudiced? He was divorced for his fault. The Illinois decree fixed alimony. He has not paid $5,000.00 of the alimony so fixed. Whether he paid it as required by the terms of the decree, or pays it now, he is in no worse position. His losses, if there are any, arise from his struggles to keep from paying the accrued indebtedness.

And, if the defendant or his counsel have guessed wrong upon his legal liability, should they criticize the plaintiff because, in 1944, she was unaware of her true legal situation, or was improperly advised thereon? After all, the provision for remarriage as relieving defendant of his obligations was inserted in the Illinois decree because a woman is normally not entitled to support from two men simultaneously. But when the attempted remarriage is a nullity, a second obligation of support never arises; and the defendant was not released.

This seems elementary and reasonable.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1951

No. 143

VERNA LEIB SUTTON,
Petitioner,
vs.
R. WELLS LEIB,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

REPLY BRIEF OF RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI

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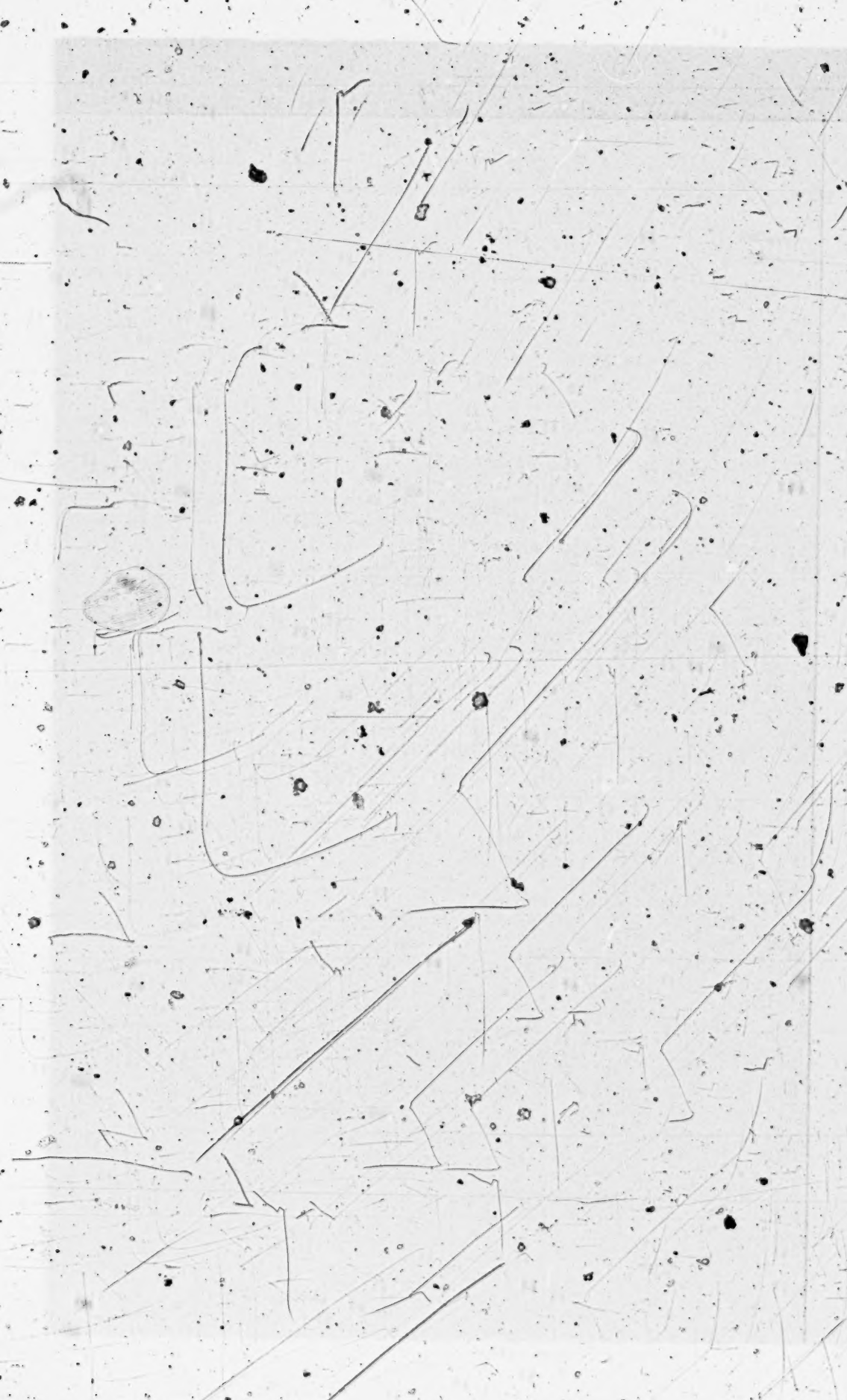

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1951

No. 143

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To the Honorable Chief Justice and Associate Justices of of the Supreme Court of the United States:

STATEMENT

The statement of the case by petitioner is sufficiently inclusive to inform the court of the salient facts, with a few exceptions, which we here supply: After her marriage in Nevada on July 3, 1944, and upon her return to New York, through her attorneys, wrote to respondent, informing him that she was remarried and that his obligation to pay alimony under the terms of the Illinois divorce decree,

were ended with the exception of $180.00 owing to her at the time of her remarriage (R. 12-13). Respondent paid such sum of $180.00 and demanded and received a receipt or letter acknowledging satisfaction in full of all sums due under the Illinois decree (R. 60-61-62-63-64-65-66). The trial court held that such satisfaction piece constituted a full settlement and release, binding upon petitioner (R. 48 and 50), and that accordingly it was not necessary to determine which of the conflicting judgments (Nevada divorce and remarriage, or New York annulment) was entitled to "full faith and credit" in Illinois. These facts not only show a complete compliance by respondent with the decree in the Circuit Court of Illinois, but also clearly disclose that petitioner construed and interpreted the terms of the decree, and the settlement agreement, to be that any marriage by her was the termination of respondent's obligation. The Court of Appeals did not agree with the Trial Court in respect to the judgment of the trial court that what was done amounted to a release and satisfaction of all obligations of respondent to petitioner (R. 88-89). In so holding we believe the facts were not fully realized. It held that the Nevada marriage of petitioner was valid in Nevada and was entitled to full faith and credit in all sister states, and that the New York annulment had and has no extraterritorial effect, either in Nevada (where the marriage was contracted) or in Illinois (where the alimony decree was originally entered) (R. 89-90). It is our belief that the construction placed upon the last payment made by respondent at the demand of the petitioner, constitutes a construction by both parties upon the agreement which is embodied in the decree of divorce of the Circuit Court of Sangamon County, Illinois.

Reasons in Opposition to Petition

We do not believe that the case of Williams vs. North Carolina was misunderstood by the United States Circuit Court of Appeals.

The facts in this case clearly disclose that petitioner, who is a mature person, went from New York to Nevada, aware of all facts disclosed by the record, as stated in the opinion of the Circuit Court of Appeals. The demand made by her for the payment of alimony, even for the month in which she was married, was made with the full understanding of her contract with respondent and the payment pursuant to this demand was intended by her and her attorneys, and the respondent and his attorneys, to completely discharge all further obligations of respondent to her under that divorce decree and contract. This construction should be given great weight and the question of good faith, by petitioner, should be considered with reference to the exercising of the discretion of the court in this application. Despite the assertion by petitioner that the case presents a question of great public importance, we do not believe that this is so. Nowhere in any of the decisions of this court can we find any statement which justifies this conclusion.

PROPOSITIONS OF LAW

I.

A marriage is valid everywhere if the requirements of the marriage law of the State where the contract of marriage takes place are complied with (even though in contravention of the public policy or statutes of a State in which the parties were domiciled either before or after such marriage).

Williams vs. North Carolina (I), 317 U.S. 287, 307;
Williams vs. North Carolina (II), 325 U.S. 226, 239;
Loughran vs. Loughran, 292 U.S. 216;
Travers vs. Reinhardt, 205 U.S. 423;
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Yarbourough vs. Yarbourough, 290 U.S. 202 (child support);
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Ertel vs. Ertel, 313 Ill. App. 326 (331);
Pierce vs. Pierce, 379 Ill. 185 (190-1);
Powell vs. Powell, 207 Ill. App. 292. Affd. 282 Ill. 357.

II.

The full faith and credit clause of the Constitution, while requiring recognition of a status created by the laws or judgments of a sister State, does not necessarily require that the domicilliary State extend, within its borders, the incidents flowing from or attached to such status. But in refusing to extend such incidents to its domicilliaries, such state cannot impose its domestic or public policy beyond its own borders. In other words the New York annulment does not vitiate or destroy the existing status of the parties in Nevada, in Illinois or in any other State.

Alaska Packers Association vs. Industrial Acci. Com., 294 U.S. 532;

Re Youmans, —Minn.—; 15 N.W. (2d) 537; 154 ALR 1171, 1177;

Yarbourough vs. Yarbourough, 290 U.S. 202, 216, 219;

New York vs. Halvey, 330 U.S. 610, 617, 618;

Criss vs. Industrial Commission, 348 Ill. 75 at 80;

Pierce vs. Pierce, 379 Ill. 185 at 189;

Reifschneider vs. Reifschneider, 241 Ill. 92 at 96;

Restatement of the Law (Conflict of Laws) Sec. 134.

III.

Marriage is a civil contract to which there are three parties, the husband, the wife and the state. One of the incidents arising out of that status is the duty of the husband to support his wife. Under this contract and the decree plaintiff was not unmarried immediately when she entered into a marriage with Walter J. Henzel, at Reno, Nevada, on July 3, 1944.

Maynard vs. Hill, 125 U.S. 190;

Leland vs. Leland, 319 Ill. 426;
Heck vs. Schupp, 394 Ill. 296;
Arndt vs. Arndt, 399 Ill. 490.

IV.

The obligation to pay alimony may be abandoned by the one entitled to it, and the validity of remarriage when this is stated as the termination period of the obligation to pay alimony, does not affect the right of recipient, but all obligation upon the part of the one required to pay, ceases.

Lehmann vs. Lehmann, 225 Ill. App. 513;
Stillman vs. Stillman, 99 Ill. 196;
Britton vs. Chamberlain, 234 Ill. 249;
Maginnis vs. Maginnis, 323 Ill. 118.

ARGUMENT

Respondent does not know what occurred in Nevada with reference to the divorce of Walter J. Henzel, and he does not know what occurred in petitioner's annulment proceeding in New York. He was not a party to either proceeding and had no information whatever as this record discloses, until the time when demand was made upon him for the revival of alimony payments before this suit was begun (R. 10). This claim for such payments was for the period inclusive of August 1st, 1944 to November 21st, 1947 (the date of the Sutton marriage) (Opinion of Circuit Court of Appeals, PP. 87, 88). The complaint was filed in this case April 12th, 1950, and shows that Vera Leib, Petitioner, who was the former wife of respondent, is a citizen of New York; that she was married to respondent June 25, 1924, and divorced from him October 11, 1939 (R. 3); that he made payments to her in accordance with the decree until the first day of August, 1944 (R. 4); that on the 21st day of November, 1947, she was married to one Sherwood Sutton (R. 4); that on July 3, 1944, she married Walter J. Henzel in Reno, Nevada (Opinion of Circuit Court of Appeals, R. 87, 88). After her marriage, she and Walter J. Henzel resided together as man and wife until on or about August 3, 1944 (R. 22-23), when he was served with summons in a separate maintenance suit begun by his former wife, Dorothy Henzel. The decree in the proceeding brought by Dorothy Henzel was entered by the New York Court on June 22, 1945. In January of 1945 petitioner instituted proceedings in the Supreme Court of the State of New York for the annulment of her Reno marriage to Walter J. Henzel (R. 23). On June 6, 1947, an interlocutory

judgment was entered in her favor, annuling the marriage. This became final three months after that date (R. 24). On November 21, 1947 she was married to Sherwood Sutton (R. 4). Thereafter this suit was filed to recover alimony during the period she was married to and living with Henzel, and thereafter until the Sutton marriage. There was no decree of any court that her marriage to Henzel was void.

We do not question the right of any court to inquire collaterally into a void decree entered by any other court. However, it must be borne in mind that this record does not disclose any attack in Nevada, upon the marriage of these persons. New York undoubtedly has the power to determine the validity of a marriage between its citizens, or one of its citizens, and another person. Its judgment could not in any regard be res adjudicata, so far as respondent is concerned, because he was not a party to the proceedings in New York. Illinois does give full faith and credit to the judgment of the State of New York, in which it is held that insofar as its citizens were concerned, in that State, the divorce obtained by Henzel in Nevada was void. This judgment of the New York court depended upon the facts presented to that court in that proceeding to which the respondent was not a party. The courts of each state insofar as marital questions are concerned, have sole power to determine the status of their citizens. This does not in any way affect the validity of the marriage in Nevada of petitioner and Henzel, so far as Nevada is concerned.

The statement made by petitioner that the court of appeals did not understand the effect of the decision in the case of *Williams vs. North Carolina*, 325 U.S. 226; 65 S. Ct. 1092; 89 L. Ed. 1577. Certain excerpts from the opinion

brief, but a reading of the opinion of the Circuit Court of Appeals clearly discloses that the effect of the decision in this case, upon the situation presented by the record, was clearly considered by the court, and we submit that the conclusion reached by the court in regard to it, is sound.

We desire to carry the thought of the marriage of petitioner and Henzel, in Nevada, as the basis for the termination of the obligation of respondent, as shown by the settlement agreement and the decree approving it. In the case of *Lehmann vs. Lehmann,* 225 Ill. App. 513, on page 526, the Court said:

> "Even though it be considered that such marriage was not a valid one in *Illinois,* it was valid in New Jersey, where performed, and also valid in their subsequent successive domiciles, and we think that under all the facts disclosed it should be held, contrary to the finding of the chancellor in the decree appealed from, that she remarried within the meaning of the words contained in said divorce decree of April 1, 1915, and in the written agreement entered into between the parties, about that time, and that she thereby elected to forfeit, and did forfeit, her right to receive alimony for her own support thereafter from respondent. As said in *Stiliman vs. Stillman,* 99 Ill. 196, 202: 'It is her privilege to abandon the provision the decree of the court made for her support under the sanctions of the law, for another provision for maintenance which she would obtain by a second marriage, and when she has done so the law will require her to abide her election.' "

The facts in this case clearly show that the petitioner believed she was entering into a valid marriage in Nevada with Henzel. This is shown by her demand for alimony payments due for June and July of 1944. Upon the payment of the amounts due her for those months—she stated that this was in full of all further obligations of the respond-

ent. This payment was made by respondent upon the theory that his entire obligation to her under the decree in their divorce was completely ended. Both parties placed this construction upon the contract. There is reason for this belief found in the decree, and in the obligation of a husband to support his wife. The Common law and the decisions under our divorce statutes uniformly sustain this obligation not only during the marriage, but after a divorce, and in Illinois in some instances even though the fault be that of the divorced wife. When a divorced woman remarries she determines that she will look to the person then becoming her husband as a substitute for her former husband, with reference to this obligation. This is the effect of the decision in the case of *Lehmann vs. Lehmann,* 225 Ill. App. 513, and it is sustained by the cases which we have cited in our Division IV of the Propositions of Law.

Upon page 527 of the opinion in the *Lehmann case* the court said:—

> "Both petitioner and respondent seemingly believed that the former had lost her right to receive such alimony from the latter and they acted accordingly, and thereby themselves practically construed their own agreements as to alimony. Such construction is entitled to great if not controlling weight and should, we think, be followed. (13 *Corpus Juris,* page 546, sec. 517; *Sholl Bros. vs. Peoria & P. U. Ry. Co.,* 276 Ill. 267.)"

Here is presented this situation. A mature woman was first married to respondent in 1924; twenty years thereafter, in 1944, she married Henzel, leaving her home in New York to go to Nevada for this purpose and knowing that he was in Nevada for the purpose of securing a divorce from his wife. She was chargeable with the knowledge of the laws of New York. After the determination of the

ew York Courts that her marriage to him was invalid on eptember 6, 1947, on November 21, 1947, she married erwood Sutton, and in her affidavit states that they are ill husband and wife (R. 24).

She was not an innocent person, being imposed upon, t upon two occasions, after her divorce from respondent, termined to look to first Henzel and then Sutton for the rformance of the obligation of support and maintenance rmerly imposed upon respondent. This construction the agreement entered into between her and respondent, d embodied in the decree, is entitled to great weight, and e petitioner should not now be heard to say that she did t know that the marriage she was entering into in evada, was invalid.

We respectfully submit that there is nothing unique in is situation and no matter of great public moment. We ge that petitioner does not come into this court, and did t come into the district court, asking relief upon any eritorious basis, and that by her own conduct and her n construction of respondent's obligation, and her suc-ssive marriages, she had clearly terminated all obliga-n of respondent to her.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 143.

VERNA LEIB SUTTON,

Plaintiff-Appellant,

vs.

R. WELLS LEIB,

Defendant-Appellee.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 143

VERNA LEIB SUTTON,

Plaintiff-Appellant,

vs.

R. WELLS LEIB,

Defendant-Appellee.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE.

INTRODUCTORY

The Statement, Brief and Argument for Appellant, as required by rules, correctly reports the publication of the Opinion of the Circuit Court of Appeals and the jurisdictional grounds. The statement of facts taken from the Opinion of the Court of Appeals we also concur in with one correction, viz: the date July 1, 1944 appearing in the last paragraph on page 3 of Appellant's Brief, is erron-

eous. Such date is correctly given by Justice Kerner in his Opinion as May 1, 1944. (See Trans. P. 88).

The Contested Issues

We do not concur in Appellant's statement of contested issues. The first contested issue stated by Appellant on page 4 of his Brief, is whether defendant was relieved of his obligation to pay alimony by the payment of two months past due alimony. Such inquiry is unnecessary to a decision of this case. It is our thought that there is only one vital issue in this cause, and that issue is whether the Illinois courts are duty bound to give full faith and credit to the Nevada marriage of the plaintiff-appellant, or the subsequent New York decree of annulment of such marriage.

PROPOSITIONS OF LAW

I.

The payment of $180.00 due the plaintiff on July 3, 1944 was a complete satisfaction of the Illinois decree. It was not a release of any sum due in future but was an acknowledgment of full payment of a past due obligation. The unfortunate use of the word "release" in the findings of the trial court is no part of the judgment of that court.

A. The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests.

Rogers vs. *Hill*, 289 U.S. 582, 77 L. ed. 1385 at p. 1389;

In re Forstner Chain Corporation, 177 Fed. (2d) 572 at p. 576;

Baxter vs. *City and County of Dallas*, 131 Fed. (2d) 434;

Amsinck & Co. vs. *Springfield Grocer Co.*, 7 Fed. (2d) 855 at 858.

B. There is a distinction between "satisfaction" and "release."

Miller vs. *Beck*, 108 Ia. 575;

Harrison vs. *Henderson*, 67 Kans. 194;

Glucksman vs. *Board of Education of New York*, 164 N.Y.S. 351;

Manthei vs. *Heimerdinger*, 332 Ill. App. 335;

Essington vs. *Parish*, 164 Fed. (2d) 725.

II.

The plaintiff was validly married in Nevada, in Illinois, and in every state in the Union as of July 3, 1944.

A. A marriage is valid everywhere if the requirements of the marriage law of the State where the contract of marriage takes place are complied with.

Williams vs. *North Carolina* (I), 317 U.S. 287, 307;
Williams vs. *North Carolina* (II), 325 U.S. 226, 239;
Loughran vs. *Loughran*, 292 U.S. 216;
Travers vs. *Reinhardt*, 205 U.S. 423;
Pierce vs. *Pierce*, 379 Ill. 185, 190;
Youmans vs. *Youmans*, Minn. ; 15 N.W. (2d) 537; 154 ALR 1171, 1177 (adoption);
Brown vs. *United States*, 164 Fed. (2d) 490 (3rd. Cir.);
Lembcke vs. *U.S.*, 181 Fed. (2d) 703, 704, (2nd. Cir.);
Restatement—"Conflict of Laws" Sec. 121;
Reifschneider vs. *Reifschneider*, 241 Ill. 92;
Stevens vs. *Stevens*, 304 Ill. 297;
Ertel vs. *Ertel*, 313 Ill. App. 326 (331);
Powell vs. *Powell*, 207 Ill. App. 202. Affd. 282 Ill. 357;
Criss vs. *Industrial Commission*, 348 Ill. 75 at 80.

B. Unless and until the *Nevada* courts invalidate the marriage of the plaintiff, the Illinois courts are required to give full faith and credit to such Nevada marriage.

Williams vs. *North Carolina* (I), 317 U.S. 287, 307;
Williams vs. *North Carolina* (II), 325 U.S. 226, 239;
Lehmann vs. *Lehmann*, 225 Ill. App. 513 at 526.

C. The New York decree of annulment has not and cannot have extra-territorial effect beyond the borders

of New York. Such New York decree is binding only upon domiciliaries of that State.

Williams vs. *North Carolina* (I), 317 U.S. 287, 307;
Williams vs. *North Carolina* (II), 325 U.S. 226, 239;
Loughran vs. *Loughran*, 292 U.S. 216, 223 (78 L. Ed. 1219, 1223);
Lembcke vs. *United States*, 181 Fed. (2d) 703, 704;
Criss vs. *Industrial Commission*, 348 Ill. 75 at 80;
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Reifschneider vs. *Reifschneider*, 241 Ill. 92 at 96;
Restatement of the Law (Conflict of Laws) Sec. 134;
Alaska Packers Association vs. *Industrial Acci. Com.*, 294 U.S. 532;
Re *Youmans*, Minn. ; 15 N.W. (2d) 537, 154 ALR 1171, 1177;
New York vs. *Halvey*, 330 U.S. 610, 617, 618.

ARGUMENT

The Brief and Argument of Appellant consumes many pages in a discussion of the meaning of the correspondence termed by the trial court as a "release." We do not intend to devote much time or space to such subject matter. There appears to the writer to be but one vital issue in this entire cause, and that issue is whether or not the Appellant, Verna Leib Sutton, was validly married in Reno, Nevada on July 3, 1944, and whether such marriage relieved the appellee, R. Wells Leib, from the further payment of alimony under the 1939 divorce decree obtained by his former wife. The third and later question, is whether the New York decree of annulment entered in June of 1947 by the New York courts is of any binding effect upon the Illinois courts, and whether the obligation to pay alimony extinguished in 1944 by the marriage, is revived in 1947 by the New York annulment. In other words, can the plaintiff-appellant marry, annul, remarry and annul, and collect alimony between her successive marriages following her successive annulment decrees.

With the foregoing brief outline of the matters to be dealt with in the ensuing argument, we proceed to briefly discuss the unimportant question of the "release."

I.

The record discloses that the plaintiff, Verna Leib, married Walter Henzel in Reno, Nevada, on July 3, 1944, and that at a later date the married couple returned to the State of New York. Plaintiff then caused her attorneys to demand from the defendant the alimony due to her on June 1 and July 1, 1944, accompanying such de-

mand with the statement that *she was now remarried and that the defendant was relieved from the further payment of alimony* as required by the Illinois divorce decree of 1939. Correspondence ensued concerning the exact amount then owing which was ascertained to be $180.00 which the defendant promptly paid and received in reply an acknowledgment of the receipt of such sum and the further *acknowledgment that such remittance satisfied in full the alimony claim* of the former Mrs. Leib. This correspondence appears at pages 60 to 66 of the Transcript, the final letter dated September 8, 1944, appearing at transcript page 66. The correspondence discloses beyond question that there was no demand for, or settlement of, alimoney to become due *in futuro*. The demand was for, and the settlement was on account of, alimony due to the plaintiff at the time of her remarriage. The correspondence further discloses that it was fully realized by the plaintiff and her counsel that her Nevada marriage had extinguished the obligation of the Illinois divorce decree. The defendant, upon the trial of the cause in the District Court did not plead a *release* of this obligation. He did make a motion for a summary judgment upon the ground that the Nevada marriage of the plaintiff had *extinguished* any rights formerly possessed by her to alimony. The trial court, (as is required by rule,) rendered an opinion in advance of the judgment containing specific findings of law and fact. In his findings the trial judge inadvertently used the word "release" concerning the correspondence above mentioned, and gave among other reasons for his ultimate decision, the fact that the plaintiff had voluntarily, deliberately and knowingly released her former husband from further alimony payments. The findings of the Court, preliminary to its judgment

of dismissal in bar, is no part of the judgment itself and release was not pleaded as a defense by the defendant. The entire controversy in the trial court turned upon the single question of whether the plaintiff, Verna Leib, had entered into a valid marriage contract in Nevada with Walter Henzel. The opinion and findings of the trial judge appears in the Transcript at page 44. The trial judge (Trans. 48) concludes his findings with the statement: "We are thus confronted with two conflicting decisions of sister states and it would be an incongruous situation for this court to undertake to determine which if either of such decisions should in this proceeding be accorded full faith and credit. Fortunately we are not called upon to do so as the parties themselves accepted the validity of the Nevada decree and at a time when such decree had never been challenged, entered into a contract settling the question of accrued alimony." The formal judgment of the trial court from which the successive appeals are now taken, appears at Transcript p. 49, and is a substantial repetition of the findings of law and fact. The plaintiff's suit in the trial court was accordingly dismissed, not because she had given a release, but because she had remarried and by so doing had satisfied, terminated and abrogated her right to receive alimony from her former husband. We have cited in our Brief of Authorities but a few cases to the effect that the findings and opinion of a Court are not the judgment of the Court and that if the *judgment* entered by the Court is right and just, the reasons actuating such judgment are not open to investigation or controversy. We do not repeat such citations nor discuss the same seriatim in this argument.

II.

We now proceed to the principal question as to the effect of a valid marriage in Nevada upon the courts of Illinois, in the construction of the Illinois divorce and alimony decree. We assert it to be the unanimous holding of all our courts and text writers that a marriage validly contracted in one state is valid elsewhere. Cases to this effect are cited in our Brief of Authorities under Section II. To this effect are the two most recent decisions of this Court namely, *Williams vs. North Carolina* (I and II).

In first *Williams vs. North Carolina*, 317 U. S. at page 307, this Court was dealing with the validity of a Nevada divoree and marriage and it is conceded in that decision both in the majority opinion and in the dissenting opinion, that a Nevada divorce decree entered in favor of a person then resident in Nevada and in conformity with the residence requirements and judicial procedure of that state, must be taken at its full face value in all other states. At page 299 of that decision this Court said:

> "It therefore follows that, if the Nevada decrees are taken at their full face value (as they must be on the phase of the case with which we are presently concerned), they were wholly effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages."

Following at page 301 of that decision, this Court again said:

> "But where a state adopts, as it has the power to do, a less strict rule, it is quite another thing to say that its decrees affecting the marital status of its domiciliaries are not entitled to full faith and credit in sister states. Certainly if decrees of a state altering the marital status of its domiciliaries are not

valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring considerable disaster to innocent persons" etc.

Continuing at page 303 this Court said:

"So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter."

Mr. Justice Frankfurter, in his concurring opinion at page 306 said: —

"There is but one respect in which this Court can, within its traditional authority and professional competence, contribute uniformity to the law of marriage and divorce, and that is to enforce respect for the judgment of a state by its sister states when the judgment was rendered in accordance with settled procedural standards."

In the second *Williams vs. North Carolina case*, 325 U.S. 226, Mr. Justice Frankfurter again, at page 237 of the reported decision, states: —

"If a state cannot foreclose on review here, all the other states by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a Federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional disregard by any one state of the reciprocal obligations of the forty-eight states to respect the constitutional power of each to deal with domestic relations

of those domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights."

Mr. Justice Murphy concurring in the same decision, at page 239, of the report states:—

"The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders."

Mr. Justice Rutledge, in the same decision, appearing at page 244 of the report, sheds further light upon the question by the following language:—

"Nevada's judgment has not been voided. It could not be if the same test applies to sustain it as upholds the North Carolina convictions. It stands, with the marriages founded upon it, unimpeached. For all that has been determined or could be, unless another change is in the making, petitioners are lawful husband and wife in Nevada. (citations) They may be such everywhere outside North Carolina."

Mr. Justice Rutledge continues on pages 246 and 247 with the following pertinent language:—

"What exactly are the effects of the decision. The court is careful not to say that Nevada's judgment is not valid in Nevada. To repeat, the court could not so declare unless a different test applies to sustain that judgment then supports North Carolina's. Presumably the same standard applies to both, and each state accordingly is free to follow its own policy, wherever the evidence, whether the same or different, permits conflicting inferences of domicile as it always does when the question becomes important . . . The necessary conclusion follows that the Nevada decree was valid and remains valid within her borders. So

the marriage is good in Nevada, but void in North Carolina just as it was before the jurisdictional requirement of domicile was freed from confusing refinements about matrimonial domicile," etc.

We have cited in our Brief the case of *Loughran vs. Loughran*, 292 U. S. 216, where the marital status of litigants was involved, and Mr. Justice Brandeis, in that decision laid down the oft repeated rule, at page 223:—

> "That a marriage, not polygamous or incestuous, or declared void by statute will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction. The mere statutory prohibition by the state of the domicile, either generally of the remarriage of a divorced person or of remarriage within a prescribed period, is given only territorial effect. Such a statute does not invalidate a marriage solemnized in another state in conformity with the laws thereof."

Mr. Justice Brandies, at page 227 of the same decision, stated that:—

> "One state may in the exercise of the police power, prohibit the enjoyment by persons within its borders of many rights acquired elsewhere and refuse to tender the aid of its courts to enforce them."

Based upon the quoted langauge of these decisions (and many others cited in our Brief, Section II), we may concede that the State of New York, in the exercise of its police power, and presumably of its own public policy, may refuse to extend its aid to citizens within its own borders, or to recognize, within the boundaries of New York, rights and status acquired in other states and enforcible and recognized in all other states, except New York. What we are trying to say at this point is that the action of the New York courts declaring the marriage of

Verna Henzel to be null and void, is merely the expression of the public policy and the police power of New York only. Such New York annulment decree did not effect the records in Nevada, nor in Illinois, nor in any other of the forty-seven states, and it is our position, therefore, that the plaintiff in the instant cause is validly married in every state in the Union, except New York, and has been so validly married since July 3, 1944. Especially is she "remarried" within the language and meaning of the Illinois divorce decree under which she now attempts to collect alimony from her former spouse, the defendant.

The plaintiff-appellant, in Ler Brief, concedes (Page 17 of plaintiff's Brief) that "Illinois had no occasion to pass upon the validity of the remarriage of the plaintiff to Henzel. Nor has Nevada passed upon this question." The plaintiff further, at page 10 of her printed Argument, concedes our position when her counsel states, "we emphasize that the obligation is an Illinois obligation and under the well settled rules of this Court the Federal Court must determine whether or not Illinois courts, passing upon these issues, would hold the defendant discharged."

We have included in our Brief, Section H, a number of Illinois Supreme Court decisions, each illustrative of the fact that Illinois recognizes a marriage as valid and binding if valid and binding by the laws of the state where entered into. The case of *Pierce vs. Pierce*, 379 Ill. 185, is an instance where the Supreme Court of Illinois recognized the validity of a common law marriage in Nevada long after common law marriages had been prohibited in Illinois, stating that "the status of citizens of a state in respect to the marriage relationship is fixed and determined by the law of that state, but marriages of citizens of one

state, celebrated in another state which would be valid there, are generally recognized as fixing the status in the state of the domicile."

Again in *Criss vs. Industrial Commission*, 348 Ill. 75, at page 80, the Illinois courts recognized the validity of the marriage in Alabama of Illinoi parties who were prohibited by Illinois law from marrying within one year from a previous divorce. The Illinois Supreme Court held in this case that the prohibition of marriage to its citizens had no extraterritorial effect, and that since the parties were validly married in Alabama, according to the laws of Alabama, that the marriage would be recognized in Illinois.

Again in *Stevens vs. Stevens*, 304 Ill. 297, the Supreme Court of this state again recognized the validity of a foreign marriage prohibited to Illinois citizens in Illinois. Our Supreme Court there stated "the status of citizens of a state in respect to a marriage is fixed by the law of that state, but marriages of citizens of one state, celebrated in another state, and which would be valid there, are generally recognized as fixing the status in the state of domicile."

The overwhelming weight of authority upon this proposition illustrated by the foregoing citations and quotations therefrom, is codified in Restatement of the Law under the title "Conflict of Laws," Sec. 121, as follows:—

"TOPIC I MARRIAGE

121. Law governing validity of marriage.

Except as stated in 131 and 132 (polygamy, incestuous, etc.) a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."

The third and final issue of the present cause concerns the effect of the New York decree of annulment upon the *status* of the plaintiff in Nevada, in Illinois and in all states, except New York. It is our contention and position that even though New York, because of its own public policy, police power and regulation of its own citizens may see fit to deny, within its own borders, the benefits, fruits and status acquired in other states, that such denial to its own citizens of the incidents flowing from a legal contract, does not nullify, invalidate nor negate the status of such persons in other states where such status, benefits and rights were lawfully acquired. In other words, the New York decree of annulment was and is effective only in the State of New York. A mere series of questions will epitomize the logic of our argument and position. If the plaintiff and her husband, Walter Henzel, had remained in Nevada, would they have been married or not in Nevada? If they had come from Nevada to Illinois and established a domicile in Chicago, would they be guilty of bigamy or living in an open state of adultery in Illinois? If the authorities in any state in the Union (except New York) had prosecuted the plaintiff and her new husband, as was done in Williams vs. North Carolina, for bigamy, could the parties have been held guilty of such crime in Nevada, Illinois, California, Louisiana or any other states, except New York? There is certainly but one answer to the foregoing questions.

Lastly, how can the Illinois courts give full faith and credit to judgments, decrees, divorces and marriages of two sister states which are diametrically opposed to each other. Nevada entered a divorce decree; the parties were validly married in Nevada; New York granted separate mainte-

nance to the former wife of Walter Henzel and granted a decree of annulment to the plaintiff from her marriage to Walter Henzel. Illinois and the Illinois courts are now called upon to give full faith and credit to these judgments, decrees and laws of two sister states. Yet the courts of Illinois, in giving full faith and credit to the Nevada divorce and marriage, must ignore, refuse to recognize and deny full faith and credit to the New York decree. If upon the other hand the Illinois courts give full faith and credit to the New York annulment decree, they must at the same time refuse full faith and credit to the Nevada marriage. As stated by the Trial Judge in his findings (Trans. 48) "We are thus confronted with two conflicting decisions of sister states, and it would be an incongruous situation for this court to undertake to determine which if either of such decisions should in this proceeding be accorded full faith and credit."

In conclusion we wish to remind this Court that the defendant, R. Wells Leib, was not a party to any of these proceedings, marriages, divorces or annullments in the two sister states. He had no notice thereof and no opportunity or right to assert his rights either in Nevada or in New York. In effect, he is an innocent bystander, now sought to be involved by the migratory marriage and divorce, desires and activities of his former wife. He is now called upon to pay $5,000 in alimony, which his former wife notified him in 1944 was at an end, and he is now, five years later, subjected to an obligation from which he was freed and discharged by his wife's marriage (and her written acknowledgment thereof), to another man in Nevada. If the doctrine of clean hands has any application in a court

of equity, this is certainly the proper case in which to apply such a doctrine.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 143.

VERNA LEIB SUTTON,
Plaintiff-Appellant,

vs.

R. WELLS LEIB,
Defendant-Appellee.

PETITION FOR REHEARING.

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Now comes the Plaintiff-Appellant, Verna Leib Sutton, and respectfully prays that a rehearing in this cause be granted.

GROUNDS FOR REHEARING.

Upon March 3, 1952, this Honorable Court, in an opinion by Mr. Justice Reed, reversed the judgment of the Court of Appeals for the Seventh Circuit, and remanded the proceedings with directions to determine the amount of defendant-appellee's liability to plaintiff-appellant under the Illinois law. This rehearing is sought by plaintiff-appellant, despite this Court's ruling in her favor, in order, first, that the opinion may be rewritten to avoid uncertainty in certain aspects which may otherwise arise in

future litigation before this Court; second, to request this Court to make an express determination as to plaintiff-appellant's rights in view of the following matters:

I. It is not necessary to require the Court of Appeals to determine the Illinois rule as to the effect of a bigamous remarriage. The Illinois law is settled upon that question, and this Court's opinion can and should adhere to that result under Erie v. Tompkins, 304 U. S. 64.

II. Illinois, in view of its holdings, is not restricted to the date of the New York annulment decree. It holds a bigamous marriage void ab initio, not necessitating a decree of annulment to declare it so.

III. It follows, therefore, under the Illinois rule, that an alimony obligation is not interrupted by the void remarriage, and that defendant's duty to pay alimony continued under the Illinois decree, and did not merely rearise by virtue of the New York decree of annulment.

IV. By referring to a possible difference in result as to the rights of "strangers" to a decree, this Court has created an apparent inconsistency with its decision in Johnson v. Muelberger, 340 U. S. 581.

SUGGESTIONS IN SUPPORT OF REHEARING.

The learned opinion of this Court clarifies the legal effect of divorce proceedings in a "quick divorce" state not having jurisdiction over both parties to such action, and we are in entire accord with this Court's conclusion as to that matter. However, we believe that some of the language of the opinion may lead to uncertainty in future cases arising in this Court, and could also result in the loss of substantial rights to the present plaintiff. Doubtless this is our fault for not stating more clearly, in our briefs, the Illinois rule. The principal misapprehension arises from the following statement of this Court in its opinion.

The opinion states: "Mrs. Sutton relied upon the New York annulment decree as determining that her Nevada marriage was void" (Opinion, p. 1).

This is quite correct, in part. We relied also upon the New York decree in the Henzel proceedings declaring the invalidity of the Nevada divorce decree (Tr. 27). And we went on to point out (Appellant's Brief, pp. 18, 19):

> "A provision discharging a man from alimony obligations upon remarriage of his former wife contemplates that a woman is not ordinarily entitled to support from two husbands at the same time. When a new husband's obligation of support commences, the former husband's obligation terminates. But if the new marriage is wholly void, so that the new spouse does not become liable for such support, a different rule must follow, for two reasons. One is that such provision for the termination of alimony never contemplated a release from liability except by the substitution of someone to take over the support obligation. Second, is the rule of public policy which envisions that the woman might otherwise become a ward of the state."

This Court has now cast back upon the Court of Appeals the duty "to consider the effect of the annulment under the law of Illinois on the respondent's alimony obligation" (p. 9). We believe this is an unnecessary task, for the reasons hereafter discussed.

The Illinois law is already settled to the effect that such a bigamous remarriage is void ab initio. If this be true, the void act could have no effect of interrupting defendant's obligation to pay alimony; and if no decree of annulment was necessary to clarify the legal situation, or to destroy the apparent status resulting from the remarriage, then the date of the New York annulment decree is imma-

terial. Illinois has stated, in such a situation: "Being a nullity, no decree is necessary to void the same." Cartwright v. McGown, 121 Ill. 388, at 395, 12 N. E. 732. We would conclude, from this, that Illinois does not regard the void remarriage as an act even temporarily lifting the defendant's obligation; and we conclude further that the annulment proceedings were, actually, not necessary. Clearly, the fact that plaintiff sought an annulment declaration to clarify her status would give the defendant no new or additional rights under the Illinois decree which required him to pay alimony. Surely no one would contend that a marital status between plaintiff and Henzel continued to exist following the New York adjudication of the invalidity of the Henzel divorce (June 22, 1945; Tr. 29) and the date of the annulment decree (June 6, 1947; Tr. 33). Nor, if the Nevada divorce decree was a nullity, can it be any more reasonably contended that Henzel was validly married to two women simultaneously at any time.

Illinois has also stated, in a similar case of marriage to one whose purported Nevada divorce did not free him from a former marriage: "The invalidity of the marriage of the parties to this proceeding was an established fact since its very inception." Jardine v. Jardine, 291 Ill. App. 152, 9 N. E. (2d) 645. To the effect that this is the general law, see 38 Corpus Juris 1291, 1295—"* * * no judicial decree is necessary to establish its invalidity."

This Court has already pointed out the distinction between this situation and that presented in Lehmann v. Lehmann, 225 Ill. App. 513 (Opinion, p. 10), where the second marriage is actually valid in all states other than Illinois. Where a remarriage is valid and confers new duties upon a new spouse, it is evident that the former husband should be relieved of responsibility. But when the second marriage is absolutely void as against public policy—i. e., bigamous—it is the same as if it had never

occurred. If we correctly understand this Court's opinion, all states must hold such remarriage void from its very inception. For the validity of such remarriage, ipso facto, depends upon jurisdiction in the divorcing state over the nonappearing spouse. Since there was no jurisdiction in Nevada over Dorothy Henzel, the divorce decree was void, Henzel lacked legal capacity to remarry, and the remarriage ceremony was inefficacious for any purpose.

If this is not the effect of the opinion, and if we ascribe to it a greater holding than was intended thereby, it should be rewritten for greater clarity. But, if we are correct, then there is no need for the Court of Appeals to consider how Illinois regards such a situation when its holdings are clear. Illinois would not and could not legally measure the period of defendant's obligation from the date of the annulment decree—since it holds no annulment necessary—but, rather, from the date defendant's obligation initially arose. Otherwise, if plaintiff had not sought or procured an annulment, however necessary such action, defendant's duty would never have rearisen.

To us, our view represents correct law. Of course, we have a selfish interest in urging this position. Otherwise, plaintiff may have won a Pyrrhic victory. She has gained legal recognition of her rights, but may possibly lose the money owing to her from defendant, if the Illinois law be misconstrued. This would be a hollow conquest, at best. But, apart from this personal aspect, any other result—that is, of holding something to be "nothing" in law (a "nullity", Tr. 27, 33) and yet of permitting it to destroy vested rights—would not only be a manifest inconsistency but it would be unjust. It would deprive the plaintiff of property without due process of law. Surely, neither a legally invalid act (such as the remarriage) nor a legally unnecessary act (such as the annulment) can be considered "the due process of law."

This Court has made one further statement which disturbs this Counsel deeply. It is that "Illinois is free to decide for itself the effect of New York's declaration of annulment on the obligation of respondent, a stranger to that decree" (Opinion, p. 8). Your Honors, even if the rights of my client were not here involved, I should be gravely concerned over this language. It is, I feel, a breeding ground of future controversy, a Pandora's box with the lid tilted slightly by this language. Exactly what will be the result? Each state would be given discretion to heed or to ignore as little or as much of the decree of another state as it sees fit—provided only that some new or different party appear in such proceedings. For example, take the defendant here. Certainly he was a stranger to the bigamous remarriage. Yet he seeks to claim the benefit of that act to which he was a stranger, and to disavow the detriment of the various judicial acts which declared the invalidity of such ceremony (such as the Henzel decree in New York in 1945, Tr. 27) to which he was also a stranger.

This language is particularly unfortunate in that this Court had only recently pointed out in concise language that persons other than the parties to the proceedings are concluded by the decree of a court, under the full faith and credit requirement. In Johnson v. Muelberger, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411, this result was held to apply to the children of persons involved in such a controversy. Shall such decrees have any lesser effect when a divorced husband is involved?

CONCLUSION.

For the above reasons, we respectfully urge that a rehearing in this cause be granted and the parties directed to file briefs upon the particular questions here raised, in order that complete justice may be effected between the parties, and that such changes may be made in the opinion

as may be necessary for a complete clarification of these issues.

Respectfully submitted,

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CERTIFICATE OF COUNSEL IN SUPPORT OF PETITION FOR REHEARING.

(Original on file in office of Clerk.)

State of Illinois, } ss.
Champaign County. }

John Alan Appleman, being first on oath duly sworn, deposes and says that he is Counsel for Verna Leib Sutton, petitioner in the petition for rehearing filed in this Court, and hereby certifies that the said petition for rehearing of this cause is presented in good faith, and not for delay.

John Alan Appleman.

Subscribed and sworn to before me by John Alan Appleman this 11th day of March, A. D. 1952.

Marie R. Taylor,
Notary Public—Champaign County, Illinois.

(Seal)